Roger Williams University Law Review

Volume 19 | Issue 3 Article 9

Summer 2014

2013 Survey of Rhode Island Law:Cases and 2013 Public Laws of Note

Law Review Staff

2013 Survey of Rhode Island Law

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Administrative Law. *McAninch v. State of R.I. Dept. of Labor and Training*, 64 A.3d 84 (R.I. 2013). The Superior Court has subject matter jurisdiction over administrative appeals, and the Superior Court Rule of Civil Procedure that extends the last day in computing any time period to any day which is neither a Saturday, Sunday or holiday, applies to such appeals.

FACTS AND TRAVEL

On June 30, 2009, the last day of the Providence Public Library's (hereinafter "the PPL") fiscal year, the PPL terminated thirty-eight union and eight nonunion employees.[1] Subsequently, on July 9, 2009, Karen McAninch (hereinafter "McAninch"), the business agent for the United Service and Allied Workers of Rhode Island (USAW-RI) and representative for the union employees of the PPL, filed a complaint with the Department of Labor and Training (hereinafter "the DLT") alleging that the PPL failed to pay these employees a total of $149,482.82 in accrued vacation pay.[2] The PPL argued that employee vacation pay did not accrue until July 1, 2009, the beginning of their new fiscal year, and, as none of the thirty-eight workers were still employees as of that date, they were not entitled to vacation pay.[3]

The DLT held a hearing on July 8, 2010, at which the hearing officer found that the employees were not entitled to vacation pay.[4] On October 12, 2010, McAninch filed a complaint seeking Superior Court review of the DLT's decision in favor of the PPL.[5]

On October 5, 2011, the trial justice *sua sponte* dismissed McAninch's appeal, finding that the Superior Court did not have

1. McAninch v. State of Rhode Island Department of Labor and Training, 64 A.3d 84, 85 (R.I. 2013).
2. *Id.* As support, McAninch argued that the PPL/USAW-RI collective bargaining agreement and the PPL employee handbook stated that the employees would be entitled to this accrued pay. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 85–86.

subject matter jurisdiction because McAninch had not filed a timely request for review.[6] Under the language of § 42-35-15(b), McAninch had thirty days from September 9, 2010, the date the DLT mailed its decision to the parties, in which to file her complaint with Superior Court.[7] The thirty day filing window ended on October 9, which fell on the Saturday of Columbus Day weekend in 2010.[8] McAninch contended that she filed the complaint first on October 12 when it was hand-delivered to the clerk's office and again when the identical complaint was mailed on October 8.[9] However, the clerk's office did not record it as filed until October 13.[10]

In dismissing the case, the trial justice noted several issues. First, she found that administrative appeals are similar to the Rhode Island Supreme Court's review of Superior Court decisions and, since time limitations to the Court are "mandatory," "Rule 6 of the [Superior Court] Rules of Civil Procedure—which extends the last day in computing any time period to the next day which is neither a Saturday, Sunday, nor holiday—[was] not applicable" to administrative appeals.[11] In addition, she found § 42-35-15(b),[12] the statute governing the judicial review of contested cases, including the filing period, does not contemplate waiving the time limitations for "excusable neglect," an alternative theory put forward in the plaintiff's complaint.[13]

McAninch filed a writ of certiorari on November 4, 2011, arguing that the trial court erred in its calculation of the date by which the complaint must have been filed and, alternatively, that even if the complaint was not timely filed, the court should find excusable neglect and allow the review.[14] The Rhode Island

6. *Id.* at 86.
7. *Id.*
8. *Id.*
9. *Id.* at 85 n.1.
10. *Id.*
11. *Id.* at 86.
12. "Proceedings for review are instituted by filing a complaint in the superior court of Providence County or in the superior court in the county in which the cause of action arose, or where expressly provided by the general laws in the sixth division of the district court or family court of Providence County, within thirty (30) days after mailing notice of the final decision of the agency . . . " R.I. GEN. LAWS. § 42-35-15(b) (2011).
13. *McAninch*, 64 A.3d at 86.
14. *Id.*

Supreme Court granted the writ on February 2, 2012.[15]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court reviews the applicability of Rule 6 to administrative appeals *de novo* because "the meaning and effect of court rules is a question of law."[16] Under § 42-35-16, the Administrative Procedures Act (APA), the Court also reviews *de novo* questions of administrative law keeping in mind that the "ultimate goal is to give effect to the purpose of the act as intended by the Legislature."[17]

Upon review, the Rhode Island Supreme Court first sought to determine if the Superior Court has subject matter jurisdiction over an administrative appeal. The Court determined that, based on the language in § 42-35-15(a) and (b), the Superior Court has subject matter jurisdiction over administrative appeals and, if the USAW-RI appeal was timely, the Superior Court's jurisdiction should be invoked.[18]

On appeal, McAninch argues that Rule 6 should apply to administrative appeals because of the rule's "clear language" and points to the Superior Court Rules of Civil Procedure 80(c) and 81.[19] In response, the PPL and the DLT argue that the Supreme Court had previously held that Rule 6 did not apply in administrative appeals,[20] that Rule 80(b) which states that the timeline under which a petitioner can file for review of an administrative decision "shall be provided by law," and that the "unambiguous[ ]" language in § 42-35-15 regarding the thirty day

15. *Id.*

16. *Id.*

17. *Id.* (quoting Heritage Healthcare Services, Inc. v. Marques, 14 A.3d 932, 936 (R.I. 2011)).

18. *Id.* at 87 (citing Rivera v. Employees' Retirement System of Rhode Island, 70 A.3d 905, 911 (R.I. 2013)).

19. *McAninch*, 64 A.3d. at 87–88. Rule 80(c) states that "these rules, so far as they are applicable, shall govern review proceedings." *Id.* at 87 n.2. Rule 81 contains the proceedings to which the Rules of Civil Procedure do not apply and administrative appeals are not among the proceedings listed. *Id.* at 87 n.3.

20. *Id.* at 88 (citing Pizzi v. Rhode Island State Labor Relations Board, 857 A.2d 762, 763–64 (R.I. 2004) (finding that a memorandum order for a case dismissed on procedural grounds; however, the Court discussed whether Rule 6 allowed for the time limitation to be extended by one day if the plaintiff received the decision by mail)).

filing period, should control here.[21]

In finding that Rule 6 applies to administrative appeals and, therefore, McAninch's complaint was timely filed, the Court reasoned that, although "the time and procedure" "to secure appellate review are to be strictly construed," the Superior Court has the "equitable authority" to determine whether a statute providing for judicial review should be tolled.[22] The Court looked to court rules and case law to address the defendant's arguments with regard to Rule 80(b) and § 42-35-15. In its holding, the Court found three Superior Court rules relevant: (1) Rule 6(a), which allows the filing of a request for review to occur up until the end of the day that is not "a Saturday, Sunday, nor a holiday" if the last day of the time allowed by a statute is a Saturday, Sunday, or holiday; (2) Rule 80(c), which affirms that the rules of civil procedure govern the review proceeding of administrative actions; and (3) Rule 81, which does not include administrative appeals on the list of proceedings to which the Rules of Civil Procedure do not apply.[23]

Further, by identifying case law which held that other Superior Court Rules of Civil Procedure applied to administrative appeals, the Court found precedent for the application of Rule 6 here.[24] The Court found additional textual support for its decision in Rule 1 of the Superior Court Rules of Civil Procedure which states that "rules of civil procedure [are to] be construed and administered 'to secure the just, speedy, and inexpensive determination of every action' . . . those rules of civil procedure which are consistent with the nature of an appellant proceeding may be applied in the furtherance of that goal."[25] The Court noted that its own Rule of Appellate Procedure, Article 1, Rule 20(a) contains language similar to Rule 6 "that extends the last day in computing any time period to the next day which is neither a Saturday, Sunday nor a holiday."[26] In its determination that "consistency demands that Rule 6(a) appl[y] to the Superior

21. *Id.* at 88.
22. *Id.* The Court found precedent for this reasoning in Rivera. *See id.*
23. *Id.* at 88–89.
24. *Id.* at 89 (citing Carbone v. Planning Board of Appeal of South Kingstown, 702 A.2d 386, 389 (R.I 1997)).
25. *Id.* at 89.
26. *Id.*

Court's review of administrative decisions," the Court noted that the practical result of the trial court justice's ruling would have resulted in the McAninch having only twenty nine days to file, not thirty days as afforded by law.[27] The PPL and the DLT's argument with regard to the proffered case law provided precedent was not compelling to the Court.[28]

COMMENTARY

The Court clearly resolved this matter based on a logical analysis of standard practices in the court system and a brief exploration of case law that had applied other Rules of Civil Procedure to administrative appeals. Although the Court did not return to a specific inquiry about the legislative intent, § 42-35-15,(a) and (b) lay out both the right to judicial review and the process of the review, including timelines for accessing and performing that review, the latter included presumably to promote judicial efficiency.[29] By holding that Rule 6 applies to the Superior Court's review of administrative decisions because "consistency demands [it]," it appears that the Court indirectly "give[s] effect to the purpose of the act as intended by the Legislature," as it promotes access to the right to judicial review of administrative decisions and maintains efficient court processes.[30]

CONCLUSION

The Rhode Island Supreme Court held that Rule 6 of the Superior Court's Rules of Civil Procedure is applicable to administrative decisions and therefore, the trial justice had erred in determining that the Superior Court did not have subject matter jurisdiction over McAninch's timely appeal. The Court relied on textual support in court rules as well as case law in extending Rule 6 to administrative appeals, finding that the application of the rule to this type of proceeding was consistent

27. *Id.*

28. *Id.* at 89–90. The Court noted that the case cited by the PPL was dismissed on procedural grounds, so the language in the memorandum did not provide precedent, and, further, that the facts in *Pizzi* were substantially different than those at issue here. *Id.* at 90.

29. R.I. GEN. LAWS § 42-35-15.

30. *McAninch*, 64 A.3d at 85, 89.

with other practices.

Alix R. Ogden

Administrative Law. *Rivera v. Emp. Ret. System of R.I.*, 70 A.3d 905 (R.I. 2013). A Rhode Island Superior Court has equitable authority in administrative appeals to determine whether the statute R.I. Gen. Laws 1956 § 42-35-15(b), which provides the timeline for judicial review of administrative decisions, should be tolled in appropriate circumstances. While this statute was held to unambiguously require administrative appeals be filed within thirty-days from the *day after the notice of decision is mailed*, the Rhode Island Supreme Court held the Superior Court abused its discretion in not finding a reasonable reliance basis for equitable tolling in this case. The court abrogated prior legal precedent that had misstated the administrative appeal timeline as requiring appeals to be filed thirty-days from the *receipt of notice* and because this same timeframe was communicated to the plaintiff multiple times by the deciding agency, the court found the plaintiff had a reasonable reliance basis to justify equitable tolling in this case.

FACTS AND TRAVEL

On September 17, 2007, Cranston Police Department sergeant Lillian Rivera applied for accidental disability benefits for post-traumatic stress disorder and anxiety disorder.[1] On January 9, 2008, the Retirement Board used its authority under R.I. Gen. Laws 1956 § 36-8-3[2] to deny Ms. Rivera's accidental disability application.[3] In the notice of denial dated January 18, 2008, the letter stated that Ms. Rivera could appeal to the Retirement Board if the appeal was received "within 30 days of the receipt" of the letter.[4] Ms. Rivera subsequently appealed, and the Retirement Board sub-committee voted to deny her claim and the matter was presented to the full Retirement Board for a final determination on May 14, 2008.[5] The full Retirement Board voted unanimously to uphold the sub-committee's decision to deny Ms. Rivera's accidental disability pension; however, during this hearing, the chairman of the board stated to Ms. Rivera, on the record, that she may seek judicial review with the "Rhode Island

1. Rivera v. Emp. Ret. System of R.I., 70 A.3d 905, 906 (R.I. 2013).
2. *Id.* at 907 n.1 (describing R.I. GEN. LAWS § 36-8-3 (1989) (providing provides the statutory framework for the Retirement Board and its authority to oversee the retirement system through rules and regulations)).
3. *Id.* at 907.
4. *Id.* (internal quotation marks omitted).
5. *Id.*

Superior Court *within 30 days of receipt*" of the denial notice.[6]

In the denial notice to Ms. Rivera, dated May 19, 2008, the executive director of the Employees' Retirement System of Rhode Island (ERSRI) wrote that Ms. Rivera had a right to judicial review and that "the thirty-day requirement would begin *from the date the U.S. Post Office indicates the letter was received*" by Ms. Rivera.[7] However, accompanying that letter, which was mailed to both Ms. Rivera and her attorney, was a document entitled "NOTICE OF RIGHT OF JUDICIAL REVIEW."[8] This notice indicated, pursuant to "Rhode Island General Laws § 42-35-15," that Ms. Rivera had "thirty (30) days *from the date of the mailing* of" the denial notice to file an appeal.[9] The denial letter was dated May 19, 2008 and postmarked on May 21, 2008.[10] Ms. Rivera signed an affidavit that she received the certified mail notice and also retrieved the certified letter on May 29, 2008.[11] Ms. Rivera appealed the ERSRI final decision to the Superior Court on June 27, 2008,[12] which the Supreme Court noted was filed within thirty days of Ms. Rivera's receipt of the notice of final decision.[13]

On March 16, 2011, the trial judge of the Superior Court held that the "'[the Superior] Court lack[ed] jurisdiction over this matter'" because the petitioner did not file the appeal within the statutory timeframe dictated in General Laws 1956 § 42-35-15(b).[14] Further, the trial judge found against Ms. Rivera's contention that this statute was ambiguous and instead found the statutory language was unambiguous, "require[ing] the filing of agency appeal in Superior Court thirty days from the mailing of the notice."[15] The trial judge also considered Ms. Rivera's

6. *Id.* at 907–08 (emphasis in original) (internal quotation marks omitted).
7. *Id.* at 908 (emphasis in original) (internal quotation marks omitted).
8. *Id.* (internal quotation marks omitted).
9. *Id.* (emphasis in original) (internal quotation marks omitted).
10. *Id.* n.4 (explaining that Ms. Rivera claimed the letter's postmark really read May 22, 2008).
11. *Id.* at 908.
12. *Id.*
13. *Id.* at 913.
14. *Id.* at 908*; see also* R.I. GEN. LAWS § 42-35-15(b) (providing that proceedings for review are instituted by filing a complaint in superior court "within thirty (30) days after the decision thereon").
15. *Rivera*, 70 A.3d. at 909.

argument that she had reasonable reliance for her appeal date but found that while equitable tolling "*could* apply," it should not apply in this case because Ms. Rivera did not have a sufficient basis for reasonable reliance of the agency's erroneous statements about the filing timeframe.[16] The primary basis for the finding of unreasonable reliance precluding equitable tolling was that Ms. Rivera's attorney "should have been aware of the correct deadline"; thus, the Superior Court entered judgment against Ms. Rivera on April 28, 2011.[17]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court granted certiorari to review Ms. Rivera's appeal of the Superior Court's decision regarding denial of administrative appeal.[18] The Court noted that while it never before expressly decided the standard of review for Superior Court decisions regarding equitable tolling, abuse of discretion was the proper review standard to evaluate the trial judge's decision as to whether or not to allow equitable tolling to extend a statutory appeal deadline.[19] The Court decided this was the appropriate standard because other courts used this standard in similar circumstances.[20]

Substantively, first the Court addressed the trial judge's holding regarding whether § 42-35-15(b) was ambiguous and upheld the lower court's holding that the statute was clear and unambiguous, and thus, the statute must be interpreted literally, giving plain and ordinary meaning to words with "no room for statutory construction" whereby requiring the statue to be applied "as written."[21] Further, because the Court found § 42-35-15(b) unambiguous regarding the timeline for administrative appeals, the Court was forced to abrogate its previous holding in *Bayview*

16. *Id*. (emphasis in original).
17. *Id*.
18. *Id*. at 909–910; *see generally* R.I. GEN. LAWS § 42-35-15(g).
19. *Rivera*, 70 A.3d. at 909–10 (citing Holmes v. Spencer, 685 F.3d 51, 62 (1st Cir. 2012); United States v. Gabaldon, 522 F.3d 1121, 1124 (10th Cir. 2008); Zerilli-Edelglass v. New York City Transit Auth., 333 F.3d 74, 81 (2d Cir. 2003)).
20. *Id*.
21. *Rivera*, 70 A.3d. at 910 (citing Planned Env't Mgmt. Corp. v. Robert, 966 A.2d 117, 121 (R.I. 2009) (internal quotation marks omitted)).

Towing, Inc. v. Stevenson.[22] In that case the Court had misstated the statutory timeline as allowing appeals to be filed thirty days "*after receiving notice"* and clarified that the thirty-day timeline for administrative appeal decisions begins the day after notice is mailed.[23] The Court also held that the postmark provided conclusive but not exclusive evidence of mailing date; however, here such a holding was inconsequential because by any calculation the petitioner's June 27, 2008 complaint was filed more than thirty days from the date of the denial notice mailing.[24]

Second, the Court addressed the trial judge's statement that the Superior Court lacked jurisdiction for appeal of this administrative decision due to timeliness.[25] The Court held that the Superior Court had jurisdiction for administrative appeals and unquestionable power to adjudicate the subject matter, but also noted that the proper question was whether or not the Superior Court *should* have adjudicated equitable relief given the unambiguous timing statute for administrative appeals and the fact that "[s]tatutes prescribing the time and the procedure" for appellate review should be "strictly construed."[26] Nevertheless, the Court noted that strict statutory construction in the context of equity is not an "impenetrable bar" and held that the Superior Court has equitable authority to determine if judicial review of administrative decisions pursuant to § 42-35-15(b) "should be tolled in appropriate circumstances."[27]

Third and finally, the Court questioned whether the trial judge abused his discretion by finding no reasonable reliance and answered this question in the affirmative.[28] The Court specifically pointed to the inaccurate timelines that had been affirmatively communicated to Ms. Rivera twice by letter and in the final

22. *Id.* at 911; 676 A.2d 325, 328 (R.I. 1996) (emphasis in original) (internal quotation marks omitted).

23. *Rivera*, 70 A.3d at 911.

24. *Id.*

25. *Id.* at 908.

26. *Id.* at 909, 911–12 (citing Narragansett Elec. Co. v. Saccocio, 43 A.3d 40, 44 (R.I. 2012); Johnson v. Newport Cnty. Chapter for Retarded Citizens, Inc., 943 A.2d 1045, 1051 (R.I. 2008); Sousa v. Town of Coventry, 774 A.2d 812, 814 (R.I. 2001)) (emphasis added). Specifically, the Court stated in *Johnson* that "equitable tolling is an exception to the general statute of limitations based upon principles of equity and fairness." 943 A.2d at 1051.

27. *Rivera*, 70 A.3d at 912 (citing *Johnson*, 943 A.2d at 1051).

28. *Id.* at 913.

hearing on May 14, 2008, by the chairman.[29] Therefore, the Court held that while the notice of judicial review that accompanied the final denial letter did contain the correct statutory timeframe, the multiple conveyances of the erroneous deadlines through ERSRI's official communication made it reasonable that Ms. Rivera would rely on the erroneous deadline.[30] Further, as Ms. Rivera's appeal was filed within the thirty-day timeline dictated under the erroneous but relied-upon timeline, the Court could not uphold the trial judge's finding of unreasonable reliance.[31] The Court thus found the trial judge's refusal to toll the statutory deadline was an abuse of discretion and thus, quashed the judgment of the Superior Court, directing that on remand Ms. Rivera's appeal was to be considered timely.[32]

COMMENTARY

The holding in this case clarifies the statutory deadline for appeals in Administrative Law cases. The holding had underpinnings of fairness policy in an area of law, specifically statutory deadlines, that typically has little emphasis on fairness. Thus, the holding can be interpreted as opening the door in comparable factual circumstances where tolling of statutory deadlines serves the principles of fairness and equity.

The Court based its holding on the fact that authoritative misstatements were communicated to Ms. Rivera by the administrative agency, the same erroneous statements about the administrative deadline were made in *Bayview Towing*, and that case was subsequently followed by the United States Court of Appeals for the First Circuit in *Providence School Department v. Anna C.,* and therefore it was reasonable for Ms. Rivera to rely on the erroneous timeline as the applicable law for administrative

29. *Id.* at 907–08, 913. The original denial notice dated January 18, 2008 and the final determination denial notice dated May 19, 2008 both indicated that the thirty-days began upon receiving notice of denial. *Id.* at 907–08.

30. *Id.* at 908, 913. The court also noted that while Ms. Rivera's attorney should have implemented the better practice of consulting the text of the actual APA, that this did not negate Ms. Rivera's reasonable reliance. *Id.*

31. *Id.* at 913–14.

32. *Id.* at 914.

appeal deadlines in Rhode Island.[33] The Court emphasized that the Superior Court has equitable authority to apply tolling in certain circumstances and held that because reliance was reasonable in this particular circumstance denying equitable tolling in this case was an abuse of discretion.[34]

The Court opinion, on its face, emphasized that "principles of equity and fairness" dictated the outcome in this "rather unusual case," implying a rather narrow holding.[35] However, despite the impliedly narrow holding, the Court also highlighted that the principles of equity and fairness should dictate the application of equitable tolling in future administrative appeals under § 42-35-15(b), despite the general rule that unambiguous statutes create a presumption that statutory timelines should be construed strictly.[36]

The Court's further emphasis of equity and fairness principles at the end of the decision seems to imply that these principles were important to the Court and could help predict outcomes in future cases.[37] Further, in the portion of the opinion refuting that statutory construction is an "impenetrable bar" to concepts of equity, the Court emphasized the holding in *Johnson*, which states specifically that "equitable tolling is an exception to the general statute of limitations based upon principles of equity and fairness."[38] Given the emphasis on equity and fairness throughout the opinion it seems possible that in similar future cases principles of equity and fairness may provide an additional argument for relief where administrative appeals would be otherwise barred by § 42-35-15(b).

CONCLUSION

The Rhode Island Supreme Court abrogated prior misstatements as to the applicable statutory deadline for administrative appeals under § 42-35-15(b) and clarified that the statute requires appeals to be filed within thirty-days from the

33. *Id.* at 912–13; *see also* 676 A.2d at 328; 108 F.3d 1, 2 (1st Cir. 1997).
34. *Rivera*, 70 A.3d at 912–13.
35. *Id.* at 913–14.
36. *Id.* at 910, 912; *see also Planned Env't Mgmt. Corp.*, 966 A.2d at 121; *Sousa*, 774 A.2d at 814.
37. *See Rivera*, 70 A.3d at 913.
38. *Id.* at 912 (quoting *Johnson*, 943 A.2d at 292).

mailing of the administrative agency's denial notice.[39] The Court reaffirmed that while statutes prescribing administrative deadlines are to be strictly construed, Superior Courts can apply equity principles if reasonable reliance is met such as in this case.[40]

Paige Munro-Delotto

39. *Id.* at 911.
40. *Id.* at 912–14.

Arbitration. *Wheeler v. Encompass Ins. Co.*, 66 A.3d 477 (R.I. 2013). A defendant's objection to a plaintiff's petition to confirm an arbitration award is sufficient to satisfy the "application" element of R. I. Gen. Laws § 10-3-14(a), allowing the Superior court to conduct a modification inquiry. Findings that arbitrators made an error of law are not sufficient to permit modification of an arbitration award.

FACTS AND TRAVEL

Plaintiff, Joyce Wheeler ("Plaintiff"), was injured in a motor-vehicle accident with an underinsured driver, the tortfeasor, on October 19, 2007.[1] The tortfeasor's insurance company, Progressive Insurance Company ("Progressive"), did not contest liability and paid Plaintiff the $25,000 policy limit for bodily injury.[2] Plaintiff also sought to recover for her injuries under the uninsured/underinsured motorist ("UM") provisions of her own policy with Encompass Insurance Company ("Encompass"), the Defendant.[3] Plaintiff's insurance contract with Encompass capped payment of UM coverage at $100,000.[4] Encompass contested the nature and extent of Plaintiff's injuries and the parties agreed to submit the dispute to binding arbitration.[5] There was no record of the question(s) submitted to the arbitration panel.[6]

The arbitration panel concluded that Plaintiff was entitled to a total award of $172,750, which included damages and prejudgment interest.[7] The panel also concluded that Progressive had paid $25,000 of those damages and Encompass had paid $5,000 pursuant to the Medical Payment provision of the policy.[8] Following arbitration, Encompass made payment of the UM policy limit, $100,000, to Plaintiff.[9]

Plaintiff filed a petition in Superior Court to confirm the arbitration award, to which Encompass filed an objection.[10]

1. Wheeler v. Encompass Ins. Co., 66 A.3d 477, 478 (R.I. 2013).
2. *Id.*
3. *Id.* at 479–80.
4. *Id.* at 479.
5. *Id.*
6. *Id.* n.2.
7. *Id.*
8. *Id.*
9. *Id.* n.3.
10. *Id.*

Encompass argued that Plaintiff could not recover more than the UM policy limit of $100,000 and objected to the amount of the arbitration award that was over $100,000.[11] Plaintiff argued that when determining the amount an injured party was entitled to recover from a UM, *Allstate Insurance Co. v. Lombardi* permitted arbitrators to award prejudgment interest in excess of policy limits.[12] In response, Encompass alleged that it entered arbitration subject to the terms of Plaintiff's policy, which limited arbitration to disputes regarding the amount Plaintiff could recover from a tortfeasor; as the litigation at issue was not between Plaintiff and Encompass the arbitration panel was barred from rendering an award in excess of policy limits.[13] The Superior Court justice, relying on *Allstate Insurance Co. v. Pogorilich*, concluded that the arbitrator made an error of law and found that the award of prejudgment interest was therefore improper.[14] Based on this conclusion, the trial justice sustained Encompass's objection to the extent that the award exceeded the policy limit.[15] The trial justice went on to modify the arbitration award, vacating the portion of the award in excess of $100,000.[16] Plaintiff appealed to the Rhode Island Supreme Court.[17]

ANALYSIS AND HOLDING

Prior to addressing the issues, the Rhode Island Supreme Court reiterated the standard of review for arbitration awards.[18] The Court highlighted the statutory proscription against courts vacating an arbitration award absent corruption, fraud, substantial prejudice, arbitrators exceeding their power, or such

11. *Id.*
12. *Id.* at 479–80 (citing 773 A.2d 864, 870 n.2 (R.I. 2001). The Court in *Lombardi* made it a point to show that when an arbitration panel was asked to determine the liability of the UM prejudgment interest could be included. 773 A.2d at 870 n.2. The *Lombardi* Court pointed out that *Allstate Insurance Co. v. Pogorilich* announced the principal that when the arbitration panel was determining the tortfeasor's liability the limit of payment would be the tortfeasor's policy limit. *Id.* (citing 605 A. 2d 1318, 1321 (R.I. 1992).
13. *Wheeler*, 66 A.3d at 479–80.
14. *Id.* at 480, 483 (citing 605 A.2d 1318, 1321 (R.I. 1992)).
15. *Id.* at 480.
16. *Id.*
17. *Id.*
18. *Id.* at 480–81.

imperfect execution of the arbitration that no final judgment on the matter submitted was made.[19] The Court went on to point out that courts must modify or correct an award when there is evident material miscalculation of figures or in descriptions of persons, things, or property; when arbitrators make an award on a matter not submitted to them; or when the award is imperfect in form not affecting the merits.[20] The Court also reiterated its authority under R.I. Gen. Laws § 10-3-19 to make orders "as the rights of the parties and the ends of justice require."[21]

The Court first reviewed a procedural hurdle presented by Plaintiff's petition to confirm the award.[22] The Court pointed out that upon a petition a trial justice must grant an order affirming the award except in limited statutorily prescribe situations.[23] The procedural roadblock existed because in order for the trial justice to have the authority to modify an award § 10-3-14(a) as written, required an "application" for an award modification by one of the parties; however, none of the parties had filed such an "application."[24] The Court concluded that when the trial justice granted of the petition to confirm the award and vacated the portion of the award with regard to the amount in excess of the policy limit, this had the effect of modifying the award.[25] Therefore, if no "application" by either party existed, the modification would have been invalid.[26] In overcoming this issue the Court held that Encompass's objection citing specific grounds against Plaintiff's petition to confirm the award satisfied the "application" requirement of § 10-3-14(a).[27] The Court reasoned that because Plaintiff's petition to confirm the award set in motion the review and because Encompass's objection provided sufficient

19. *Id.* at 480–81 (citing R.I. GEN. LAWS § 10-3-12 (1956)).
20. *Id.* at 481 (citing R.I. GEN. LAWS § 10-3-14 (1956)).
21. *Id.* (quoting R.I. GEN. LAWS § 10-3-19 (1956)).
22. *Id.*
23. *Id.*
24. *Id.* at 481–82.
25. *Id.*
26. *Id.* (quoting R.I. Gen. Laws § 10-3-14(a) (1956)).
27. *Id.* at 482. The Court relied on the analogous situation present in *City of E. Providence v. United Steelworkers of Am, Local 15509.* 925 A.2d 246, 253–55 (R.I. 2007). The Court pointed out that in that case a motion to confirm an award alone was sufficient to trigger a review of the award and an objection to that review constituted an "application." *Wheeler*, 66 A.3d at 482 n.6.

grounds to warrant further inquiry by the lower court, there had been an "application."[28]

The Court then turned to the merits and held that the trial justice erred in modifying the arbitration award.[29] The Court reiterated that the standard of review for arbitration agreements permitted modification of an award only in the limited, statutorily enumerated, circumstances.[30] Further, the court reiterated its assertion made in *Paola v. Commercial Union Assurance Companies*, that "[a] trial justice has no power to modify an award" absent the statutorily enumerated situations.[31] The Court made special note that there was no record of the arbitration proceedings or of the question(s) submitted to the panel, and that the parties agreed that the insurance policy was not presented to the panel.[32] The Court also noted that there was a legally valid award calculating prejudgment interest.[33] From there, the Court examined the trial justice's analysis and concluded that the trial justice had inappropriately engaged in a *de novo* review and had modified the award to correct a mistake of law.[34] The Court pointed out that the trial justice had incorrectly determined that the arbitrators had made a mistake of law, believing that the law prohibited an arbitrator from awarding prejudgment interest above policy limits.[35] The Court went on to show that as a matter

28. *Id.*
29. *Id.* at 482–83.
30. *Id.* (quoting R.I. GEN. LAWS § 10-3-14(a) (1956)).
31. *Id.* (quoting 461 A.2d 935, 937 (R.I. 1983)).
32. *Id.* at 483 n.7 (countering the argument by the dissent and the decision of the trial court, the Court argued that it would be inappropriate to judge the validity of an arbitration agreement based on the wording of a policy that had not been available to the arbitration panel).
33. *Id.*
34. *Id.* at 484.
35. *Id.* n.8. The Court was careful to point out that the trial court's assessment that there had been a mistake of law was likewise incorrect. *Id.* The Court stated that the decision in *Lombardi* did not bar the award of pretrial interest in excess of policy limits when arbitrators had been asked to determine the amount injured parties may recover from the UM insurer and that the *Pogorilich* decision only barred the UM insurer from paying in excess of the policy limit when the arbitrators had been asked to decide the amount the ensured party was entitled to recover from the tortfeasor. *See id.*; 773 A.2d at 870 n.2; 605 A.2d at 1321. The Court further highlighted the fact that when there was no record of the issue submitted to the arbitrators, that as long as the agreement to arbitrate is valid and the matter of the dispute is arbitable, the arbitrators are free to frame the issue as they see fit.

of settled law, a mistake of law is not sufficient grounds for overturning an award.[36] The Court argued that to engage in a *de novo* review of the arbitration panel's award would be inappropriate, given the limited role of the judiciary in modifying arbitration awards.[37] As such the trial court had been obligated to confirm the award. Therefore, the Court vacated the order of the Superior Court that modified the award and remanded the case to Superior Court with instructions to issue an order confirming the award.[38]

Justice Robinson, while in concurrence with the majority opinion on the sufficiency of the "application," dissented against the majority's refusal to frame the issue of the award's validity through the lens of the arbitration panels authority as announced by the insurance policy.[39] Justice Robinson relied heavily on the terms of the insurance policy which provided that the parties would resort to arbitration to resolve the amount of damages owed to the Plaintiff by the tortfeasor.[40] In Justice Robinson's opinion, because the panel had made an award on an issue not submitted to them, specifically the issue of the UM insurers liability, the statute mandated that the trial justice modify the award.[41] Justice Robinson based his argument in large part on the notion that an arbitration panel obtains its jurisdiction from the consent of the parties and that a panel's jurisdiction is limited to those subjects over which the parties have given it authority.[42] Justice Robinson argued that, because there was no specific record of the questions or the issues presented to the panel, the panel's

Wheeler, 66 A.3d at 484 (citing Purvis Sys., Inc. v. American Sys. Corp. 788 A.2d 1112, 1116 (R.I. 2002)). Further, the Court noted that the panel must have understood the dispute to be between the Plaintiff and Encompass because it crafted the award in accordance with the formula presented in *Metropolitan Prop. and Cas. Ins. Co. v. Barry*. 892 A.2d 915, 923–24 (R.I. 2006).

36. *Wheeler*, 66 A.3d at 473 (citing Aponick v. Lauricella, 844 A.2d 698, 704 (R.I. 2004); *Purvis Sys, Inc*., 788 A.2d at 1115; Westminster Constr. Corp. v. PPG Indus., Inc., 376 A.2d 708, 711 (1977)).

37. *See id.* at 483–84.

38. *Id.* at 484.

39. *Id.* at 484–85 (citing Bush v. Nationwide Mut. Ins. Co., 448 A.2d 782, 784 (R.I. 1982) (Robinson, J., dissenting)).

40. *Id.* at 485 (Robinson, J., dissenting).

41. *Id.* at 485–86 (Robinson, J., dissenting).

42. *Id.* at 485 (citing Blackstone Valley Gas & Elec. Co. v. R. I. Power Transmission Co., 12 A.2d 739, 749 (R.I. 1940) (Robinson, J., dissenting)).

authority could only be determined by examining the language of the insurance policy's very narrow grant of authority.[43] Furthermore, Justice Robinson also pointed out that an arbitration panel derives its authority from the mutual consent of the parties to be bound.[44] Here, he argued that the mutual consent of the parties grant of authority to the arbitrators could only be determined to extend to the amount of damages Plaintiff suffered, not to, as the panel decided, the contractual obligations of Encompass.[45]

COMMENTARY

In examining the Court's decision it becomes apparent that the Court was not motivated to see the decision of an arbitration overturned.[46] Further, the Court seems to have been motivated to penalize Encompass, the insurer, the party with the most ability to frame the arbitration, for failing to properly create an arbitration agreement beyond the single paragraph present in the insurance policy boilerplate. The Court appears to have been completely aware that the entire case could have been avoided if Encompass, in drafting such an agreement, had instructed the panel as to its authority and which matters would be arbitable. While the dissent raises the concern that the importance of express mutual assent to the issues of arbitration has been weakened by the majority decision,[47] it does not grasp the function of this decision. The functional effect of this decision is to force parties in future arbitrations, especially those between insured and insurance companies whose stock and trade are written agreements, to specify through unambiguous arbitration agreements the scope and extent of an arbitration panel's authority.

The danger of the majority's decision is that it could function to drive up insurance costs for consumers in the state. The decision creates two separate avenues whereby insurance costs may climb. First, the decision effectively denies insurers judicial

43. *Id.* at 485 (Robinson, J., dissenting).
44. *Id.* (Robinson, J., dissenting).
45. *Id.* at 487 n.11 (Robinson, J., dissenting).
46. *See id.* at 483.
47. *See id.* at 486 (Robinson, J., dissenting) .

recourse should an arbitration panel make a mistake of law. Such mistakes of law threaten an insurer's ability to effectively cap their UM liability through policy limits when a dispute is submitted to arbitration. This increases the likelihood that arbitration becomes too unpredictable and incentivizes insurers to turn to the courts, a far more costly process. Such additional cost would conceivably be passed on to policyholders.

Second, the result may be that insurers will be more motivated to offer to settle an insured's claim at the policy limit, thereby limiting their potential liability and avoiding the risk of an incorrect and un-appealable arbitration. This would positively impact injured parties, resulting in more rapid UM compensation but would however, result in higher costs for policy holders as insurance companies raised rates to maintain steady margins. However, both of these scenarios are less likely, especially if insurers take the relatively inexpensive precaution of drafting arbitration agreements that limit the authority and scope of arbitration panels. As has been noted above, the primary function of this case will be to incentivize insurers to craft narrow arbitration agreements prior to submitting a dispute to arbitration. If such narrow agreements are the result, the outcomes should not only be more predictable, but also effectively capped. Predictable and controllable outcomes available through narrow arbitration should, if anything, help to lower or at least stabilize insurance costs.

CONCLUSION

It would seem from this opinion that, except in very limited circumstances, the decisions of arbitration panels are secure from post-decision relief on the part of one of the parties. Further, the Court affirmed the limited role of the judiciary in overturning arbitration and upheld a narrow construction of the judiciary's role under the current statute.[48] The Court's decision has placed the responsibility on the parties entering arbitration to clarify and specify those issues to be arbitrated. Additionally, the Court effectively penalized attempts to utilize post-decision litigation to avoid payment of arbitration decisions. Finally, this decision has the potential to encourage insurers to avoid arbitration and settle

48. *Id.* at 483–84.

UM claims at policy limits or through court proceedings, though such affect might cause an increase in premiums. However, the most likely functional outcome is that insurers limit arbitration panel's authority by narrowly crafted arbitration agreements.

Todd Rose

Civil Procedure. *Vogel v. Catala*, 63 A.3d 519 (R.I. 2013). Providence County Superior Court entered a judgment in favor of a lender who sued a borrower for breach of contract, breach of an implied-in-fact contract, and failure to repay based on a book account. The Rhode Island Supreme Court, unable to review this appeal in a meaningful way because the petitioner failed to provide a transcript of the lower bench trial, affirmed the judgment of the Superior Court.

FACTS AND TRAVEL

On April 9, 2007, Juan G. Catala ("Catala") called his friend David S. Vogel ("Vogel"), asking him for a loan.[1] Catala had lost his money gambling in Las Vegas and needed additional funding to recoup his losses.[2] Vogel, then in Rhode Island, agreed to wire $8,500 to Catala at The Bellagio Hotel in Las Vegas with the understanding that Catala would repay the debt within two weeks.[3]

On October 18, 2007, as Catala had failed to repay his loan for over six months, Vogel filed a complaint in Providence County Superior Court alleging breach of contract, breach of an implied-in-fact contract, and failure to repay based on a book account.[4]

On April 23, 2009, Vogel moved for summary judgment, attaching an affidavit in which he stated: "[Catala] called me to request that I loan money to him[.] [Catala] said that he had lost a substantial sum of money during his trip to Las Vegas and needed to borrow money so that he might win back at least part of what he had lost."[5] With that, Catala amended his answer to include the affirmative defense that the loan was void under G.L. 1956 § 11-19-17.[6] Subsequently, on February 23, 2010, Vogel's motion for summary judgment was denied.[7]

On November 4, 2010, the case was heard as a bench trial in

1. Vogel v. Catala, 63 A.3d 519, 520 (R.I. 2013).
2. *Id.*
3. *Id.*
4. Catala denied the breach of contract claims and stated that "he was without sufficient information to admit or deny the book account claim[.]" *Id.*
5. *Id.*
6. *Id.* at 520–21 n.3 (citing in relevant part R.I. GEN. LAWS § 11-19-17, that "[a]ll . . . promises, given or made . . . for the repayment of money knowingly lent for . . . betting, shall be utterly void.").
7. Catala also motioned for summary judgment based on his affirmative defense. *Id.* at 521. That motion was also denied. *Id.* s

Superior Court and, on May 19, 2011, the trial justice issued a written opinion, which concluded that the loan was not void under §11-19-17.[8] The trial justice concluded that "Vogel's testimony was more credible than" Catala's testimony and that the loan was not extended for gambling purposes, but rather as a traditional loan that would have to be paid back.[9] The justice ruled that to conclude the loan was invalid under §11-19-17 would be an unjust enrichment for Catala.[10] In accordance with that judgment, Catala was ordered to repay the loan along with other costs.[11]

Catala appealed the Superior Court's holding to the Rhode Island Supreme Court.[12] Catala's appeal contended that the trial justice erred in finding Vogel credible as a witness and that the trial justice erred in not voiding the loan under §11-19-17 since, according to Catala, Vogel knew that the loan would be used for gambling purposes.[13]

ANALYSIS AND HOLDING

In reviewing the lower court's ruling, this Court "gives great weight to the factual findings of a trial justice sitting without a jury in a civil matter, and [] will not disturb such findings unless they are 'clearly erroneous or unless the trial justice misconceived or overlooked material evidence or unless the decision fails to do substantial justice between the parties.'"[14] Furthermore, even if the Court's review of the record indicated that a contrary conclusion could have been reached, the Court does not substitute its view for the lower court's view when the evidence supports the lower court's findings.[15]

In this case, however, the Court was unable to conduct a meaningful review of the lower court's ruling because Catala failed to provide the Court with a copy of the transcript from the lower court.[16] Under the Supreme Court Rules of Appellate

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 522 (citing Cahill v. Morrow, 11 A.3d 82, 86 (R.I. 2011)).
15. *Id.*
16. *Id.*

Procedure, Catala, as the appellant, had a duty to provide a transcript that was "complete and ready for transmission."[17] Without a copy of the transcript, the Court held it could not "engage in any meaningful review of the trial justice's factual determination that Vogel did not 'knowingly' lend the money at issue in contravention of §11-19-17."[18] The ultimate question to be decided in this appeal was whether or not Vogel knew that the money he was lending to Catala would be used for gambling.[19] This was a question of fact that was left for the trial justice to answer and without a copy of the transcript, the Court was unable to hold that the trial justice erred in his findings.[20]

Justice Robinson dissented, contending that the Court had enough evidence to hold that Vogel should not have been repaid for his loan based on Vogel's judicial admissions.[21] Within Vogel's complaint, he stated that "[Catala] needed to borrow money so that he might win back at least part of what he had lost."[22] For Justice Robinson, the judicial admissions made by Vogel in his complaint were enough to conduct a "'meaningful review' of the trial court's decision" and find that Vogel was not entitled to repayment.[23] Justice Robinson found that in Vogel's complaint, he "explicitly indicated the purpose of the loan at issue[,]" and that loan was in direct contravention of §11-19-17.[24]

COMMENTARY

The Rhode Island Supreme Court ruled correctly in this case; without a copy of the transcript from the lower court, it was unable to conduct a thorough review of the trial justice's findings.[25]

The credibility of a witness is a factual finding, and a factual finding made by a lower court trial justice will only be disturbed

17. *Id.* (citing Small Bus. Loan Fund Corp. v. Gallant, 795 A.2d 531,532 (R.I. 2002)).
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* at 523 (Robinson, J., dissenting).
22. *Id.* (Robinson, J., dissenting).
23. *Id.* at 524 (Robinson, J., dissenting).
24. *Id.* (Robinson, J., dissenting).
25. *See id.* at 522.

when it is "clearly erroneous or unless the trial justice misconceived or overlooked material evidence or unless the decision fails to do substantial justice between the parties."[26] It is difficult, if not impossible, for the Court to make a determination going to any of these tests without a copy of the transcript.[27]

In his dissenting opinion, Justice Robinson does not see the need to review the transcript at all.[28] In his view, Vogel's own complaint appears to contain an admission that he knew the loan was for gambling purposes, and that should be enough to conduct a "meaningful review of the trial court's decision."[29] However, the affidavit on which Justice Robinson bases his dissent does not indicate that Vogel knew with any certainty that Catala would use the loan for gambling purposes, as required by §11-19-17.[30] The affidavit, the only document available to the Court for review on this appeal, does not unequivocally state that Vogel knew Catala would be gambling with the loaned money.[31] The affidavit says only that Catala "needed to borrow money so that he might win back at least part of what he had lost."[32] One can win back money through efforts and investments not limited only to gambling. Though perhaps intuitively apparent, there is no definitive indication contained within the affidavit that Catala would use the loan for gambling.[33] Without a copy of the transcript, the Court had "no choice but to uphold the lower court's finding."[34]

Furthermore, ruling in favor of a party that is unprepared for its appeal would undermine the significance of the Supreme Court Rules of Appellate Procedure. The Court was not prepared to disturb the factual findings because Catala's attorney failed to provide it with the most basic of materials. Accordingly, an unprepared appellate court is in no position to overturn a lower court's factual findings, regardless of any judicial admissions that may appear to point in one direction or another.

26. *Id.* at 522 (citing *Cahill,* 11 A.3d at 86).
27. *See id.*
28. *Id.* at 524 (Robinson, J., dissenting).
29. *See id.* (Robinson, J., dissenting).
30. *See id.* at 523 (Robinson, J., dissenting).
31. *See id.* (Robinson, J., dissenting).
32. *See id.* (Robinson, J., dissenting).
33. *See id.* (Robinson, J., dissenting).
34. *See id.* at 522 (citing Berquist v. Cesario, 844 A.2d 100, 105 (R.I. 2004)).

Also, it appears that a substantial injustice would have been done were Catala to escape responsibility and not be ordered to repay the $8,500, especially considering that his legal team failed to supply the Court with a copy of the transcript.

CONCLUSION

The Rhode Island Supreme Court affirmed the judgment of the lower court, holding that without a copy of the transcript, it was unable to conduct a meaningful review of the trial justice's factual findings and upheld the judgment that the $8,500 loan was not made in contravention of §11-19-17.

Michael Osterberg

Constitutional Law. *Reilly v. City of Providence ex rel. Napolitano*, No. 10-461 S., 2013 WL 1193352 (D.R.I. March 22, 2013). Granting summary judgment is inappropriate where a plaintiff has suffered an unconstitutional violation of his or her First Amendment right to free speech but material facts central to the apportionment of liability between individual and municipal defendants remain in dispute. An individual defendant's motion for summary judgment on the basis of qualified immunity for his or her alleged freedom of speech violation will only be granted where no dispute exists that the defendant's restriction of speech was both content-neutral and acceptable in scope. Where a plaintiff argues for the purposes of summary judgment that a genuine dispute of fact exists as to the content-neutrality of a police officer's suppression of plaintiff's freedom of speech, the plaintiff is precluded from a favorable summary judgment on the issue of municipality liability for that officer's employer until such dispute is resolved.

FACTS AND TRAVEL

On February 2, 2010, Judith Reilly ("Plaintiff") and a friend, Oscar Lemus, attended the Providence State of the City address at the Providence Career and Technical Academy ("PCTA") auditorium in order to distribute flyers criticizing Mayor David Cicilline ("Mayor") for his recent decision to re-appoint an official accused of ethics violations to the City Planning Commission.[1]

Although there was "no evidence that Plaintiff obstructed pedestrian traffic" and such traffic was "relatively sparse," someone notified Chief Dean Esserman ("Chief Esserman") of the Providence Police Department ("PPD") that either someone was distributing flyers or obstructing the entrance to the PCTA.[2] Chief Esserman testified that based on this information he asked Officer Paul Kennedy ("Officer Kennedy") to "check out the situation and address it."[3] According to Officer Kennedy's testimony, he then told Officer Alyssa DeAndrade ("Officer DeAndrade") "if there are people blocking, move them," while Officer DeAndrade testified that Officer Kennedy told her to

1. Reilly v. City of Providence *ex rel.* Napolitano, No. 10-461 S., 2013 WL 1193352, at *1 (D.R.I. March 22, 2013).

2. *Id.* at *1–2. Testimony on this fact was unclear because Chief "Esserman did not recall" whether someone "told him about flyers being distributed *or* people obstructing the entrance." *See id.* at *2 (emphasis added).

3. *Id.* at *2.

"move [Plaintiff and Lemus] from the front of the building."[4] In any event, Officer DeAndrade testified that she instructed her patrolmen to "clear the sidewalk."[5]

As a result of this chain of orders, Plaintiff testified that she was told by a PPD officer that "she could not distribute flyers anywhere on the city block in front of the PCTA."[6] Further, Plaintiff testified that she was "again approached by a [PPD] officer and threatened with arrest" after she "moved back towards the entrance."[7] According to Plaintiff's testimony, after ignoring the officers' commands a third time, Officer DeAndrade "reiterated that Plaintiff would be arrested if she continued to distribute flyers in front of the [PCTA]."[8] The facts were in dispute as to the extent of the PPD's restrictions on where Plaintiff could distribute her flyers, but the PPD at no time prevented Plaintiff from distributing flyers completely.[9] Instead, Plaintiff's ultimate claim focused on whether the extent of PPD exclusion of Plaintiff's flyer distribution was an unconstitutional suppression of her First Amendment right to freedom of speech.[10]

Plaintiff complied with PPD instructions and was never arrested.[11] However, after a formal civilian complaint to the PPD yielded no response, Plaintiff commenced a civil action against Chief Esserman, Officer Kennedy, and Officer DeAndrade, as well as the City of Providence, alleging a violation of her freedom of speech as guaranteed by the First Amendment.[12] The parties subsequently filed cross-motions for summary judgment.[13]

ANALYSIS AND HOLDING

A. *Plaintiff's Alleged Violation of First Amendment Right to Freedom of Speech*

The parties agreed upon the first two prongs of the three-step

4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at *2–3.
9. *See id.*
10. *See id.* at *1–2.
11. *Id.* at *2.
12. *Id.* at *1, *3.
13. *Id.* at *1, *12–13.

test[14] laid out by the United States Supreme Court for assessing whether or not a plaintiff's First Amendment right to free speech has been violated; specifically, that the Plaintiff's act of distributing leaflets was a constitutionally protected act of free speech and that the area where plaintiff distributed leaflets was a public forum.[15] Thus, the Rhode Island District Court for the District of Rhode Island ("the court") focused its analysis, and the parties their arguments, on the third prong of the test: whether the government's restrictions on Plaintiff's speech: "[were] content-neutral, [were] narrowly tailored to serve a significant government interest and [left] open ample alternative channels of communication."[16] If the government restrictions satisfied these three elements, then restrictions on Plaintiff's right to free speech might have been constitutional.[17]

1. Content Neutrality

The government's purpose for restricting Plaintiff's speech was the central focus of the content neutrality analysis and "[t]he 'principal inquiry' in assessing content-neutrality [was] 'whether the government has adopted a regulation of speech because of disagreement with the message it conveys.'"[18]

In this case, all three individual defendants submitted testimony that they were unaware of the contents of Plaintiff's flyers when restricting where Plaintiff could distribute the same.[19] However, Plaintiff submitted the following five pieces of circumstantial evidence to combat the individual defendants' testimony: (1) that Oscar Lemus testified that he witnessed the Mayor watching Plaintiff from a window; (2) the flyers distributed

14. To apply the three-prong test prescribed by the Supreme Court a court must determine (1) whether the First Amendment protects the alleged speech/conduct at issue; (2) whether the forum for such speech is public or non-public; and (3) whether the justifications for exclusion of speech are proper given the forum and other standards. *Id.* at *3 (citing Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 797 (1985)).

15. *Id.* at *4 (citing United States v. Grace, 461 U.S. 171, 176–77 (1983)).

16. *Id.* at *4 (quoting *Grace,* 461 U.S. at 177) (internal quotation marks omitted).

17. *Id.* at *4.

18. *Id.* at *4 (quoting Globe Newspaper Co. v. Beacon Hill Architectural Comm'n, 100 F.3d 175, 183 (1st Cir. 1996)).

19. *Id.* at *4.

by Plaintiff prominently displayed the Mayor's name in large lettering; (3) "the weakness of [individual defendants'] public safety rationale for ordering Plaintiff to move"; (4) "the City's failure to process Plaintiff's civilian complaint in the manner required by PPD procedures"; and (5) the fact that Plaintiff was never informed of the alleged public safety reasons for PPD officers restricting the areas where she could distribute flyers.[20] The circumstantial evidence cited by Plaintiff allowed the court to find that "a reasonable fact-finder could infer that [individual defendants] acted because of the contents of the flyers," and thus, their actions were not content neutral.[21]

2. Narrowly Tailored to Serve a Significant Government Interest

To justify their conduct, the individual defendants averred that their actions "advanced the government's interest in maintaining the movement of pedestrian traffic on the sidewalk in front of the PCTA" and that their actions furthered "the government's interest in ensuring that emergency exits are clear in the event of a mass evacuation."[22] Thus, individual defendants in this case offered two alleged substantial government interests, maintaining the movement of pedestrian traffic and maintaining clear emergency exits, as justifications for their conduct.[23]

The court rejected the first justification, maintaining the movement of pedestrian traffic, on the grounds that Supreme Court precedent "'ha[d] dismissed the danger to traffic congestion as a justification to ban leafleting'" because the act of handing out leaflets did not lead to pedestrian traffic congestion.[24] The Defendants' second justification, maintaining clear emergency exits from the PCTA, was similarly rejected by the court despite testimony that Chief Esserman received a complaint about Plaintiff obstructing the doors to the PTCA.[25] Based on the unsure testimony of Esserman, and the fact that such evidence would be inadmissible as hearsay at trial, the court rejected the

20. *Id.*
21. *Id.*
22. *Id.* at *5.
23. *Id.*
24. *Id.* at *6 (quoting Jews for Jesus, Inc. v. Mass. Bay Transp. Auth., 984 F.2d 1319, 1324 (1st Cir. 1993)).
25. *Id.*

individual defendants' justifications for their unconstitutional conduct, thus finding that no substantial government interest was served by their restriction of Plaintiff's speech and that the individual defendants' violated the First Amendment.[26]

3. Ample Alternative Channels of Communication

The court found, viewing the evidence in the light most favorable to Plaintiff, that the Defendants' conduct left ample adequate alternative channels of communication that Plaintiff could have utilized.[27] Regardless of the extent of PPD's alleged restrictions, Plaintiff could have distributed flyers across Cranston Street from the PCTA near the Citizens Bank parking lot or near the Central High School parking lot, both areas utilized for parking by State of the City attendees.[28] For those reasons, the court held that although, as was argued, Plaintiff was not able to access all attendees of the Mayor's speech, Plaintiff had access to a portion of such attendees.[29]

B. *Qualified Immunity*

In order to determine whether the individual defendants could be held liable for violation of Plaintiff's First Amendment right to free speech, the court looked to whether the doctrine of qualified immunity applied.[30] As framed by the court, the application of the qualified immunity doctrine turned on "whether a reasonably competent police officer could have thought that the restrictions imposed on Plaintiff's speech were constitutional."[31]

The court then found that two disputes of material fact precluded a favorable summary judgment for the individual

26. The court noted that hearsay evidence which would be inadmissible at trial is also inadmissible for the purposes of a motion for summary judgment. *Id.* at *6 (citing Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990)).

27. *Reilly*, 2013 WL 1193352, at *7.

28. *Id.* at *1, *7.

29. *Id.* at *7.

30. *Id.* at *8. In the context of this case, the doctrine of qualified immunity shields police officers from civil liability so long as their conduct is not in violation of a clearly established constitutional right of which a reasonable police officer in their situation would have been aware of. *Id.* (citing Diaz-Bigio v. Santini, 652 F.3d 45, 50 (1st Cir. 2011)).

31. *Id.* at *9.

defendants.[32] First, the court pointed to the previously discussed issue in dispute of whether the individual defendants' suppression of the Plaintiff's speech was content neutral.[33] The court then noted that if the content of Plaintiff's speech did motivate the individual defendants' allegedly unconstitutional conduct, the doctrine of qualified immunity would not shield the individual defendants from liability.[34] The second factual issue precluding the court from granting summary judgment on the individual defendants' qualified immunity defense was the dispute about the scope of their orders to Plaintiff.[35] Plaintiff testified that the individual defendants ordered her not to distribute her flyers anywhere on the PCTA block, whereas the individual defendants testified that their order was limited to the 170-foot stretch of lower sidewalk in front of the steps leading to the PCTA auditorium doors.[36] The court found that a reasonable police officer could have believed that the conduct the individual defendants attested to was constitutional, and thus, although Plaintiff's First Amendment rights were violated, the individual defendants' conduct could satisfy the standards for qualified immunity.[37] Thus, if a fact-finder determined that the individual defendants' actions were content neutral and their restrictions on Plaintiff's speech were limited to the 170-foot stretch in front of stairs to the PCTA, they would be protected by the doctrine of qualified immunity and would face no civil liability for their actions.[38]

C. *Municipal Liability*

Plaintiff's motion for summary judgment against the City of Providence would be appropriate if the individual defendants' actions on the night in question were in conformity with and motivated by official PPD policy, in which case the PPD policy could be the cause of the violation of Plaintiff's First Amendment

32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at *9–10.
38. *Id.* at *10.

rights.[39]

Plaintiff cited numerous sources of evidence that the conduct of PPD officers on the night in question was in conformity with PPD policies.[40] Thus, the court easily found that, although not facially unconstitutional, the clearly established PPD policy, which Chief Esserman knew to suppress citizen's First Amendment rights, may have been enough to hold the City liable for the actions of PPD officers who acted in accordance with that policy.[41] As such, the disposition of the case on the issue of the City's liability turned on, *inter alia*, a fact-finder's determination of the content-neutrality of the individual defendants' conduct.[42] The court found that because Plaintiff argued that a genuine issue of fact existed in regard to the content-neutrality of such conduct, a summary judgment in Plaintiff's favor on municipal liability was improper.[43]

COMMENTARY

This case implicates an individual's right to distribute leaflets, an issue about which the court is able to cite many cases explaining why public safety and pedestrian traffic, both legitimate government concerns, are often not sufficient justifications for suppression of the right to distribute literature.[44]

39. *Id.* at *11–12.

40. *See id.* Plaintiff's cited sources included testimony from Chief Esserman that indicated that the PPD officers' actions were in conformity with their training, a fact that was further attested to by Officer DeAndrade as well as by several officers serving under her control on the night in question. *Id.*

41. *Id.* at *11–12.

42. *Id.*

43. *Id.* According to the court, provided that Chief Esserman made the decision to order the restriction of Plaintiffs right based on the content of the speech, Plaintiff could succeed on her claim against the city. This is because it is essentially undisputed "that [Chief] Esserman possessed [the] final authority with respect to PPD policy," thus any decision by Chief Esserman based on the content of Plaintiffs speech would constitute PPD policy and thus expose the City of Providence to liability. *Id.* at *10–11 (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 481 (1986) (plurality opinion)).

44. *Id.* at *5 (citing United States v. Grace, 461 U.S. 171, 182 (1983); Bays v. City of Fairborn, 668 F.3d 814, 823 (6th Cir. 2012); Saieg v. City of Dearborn, 641, F.3d 727, 736–37 (6th Cir. 2011); Kuba v. 1-A Agric. Ass'n, 387 F.3d 850, 859 (9th Cir. 2004); Weinberg v. City of Chicago, 310 F.3d 1029, 1039 (7th Cir. 2002); Lederman v. United States, 291 F.3d 36, 45 (D.C. Cir.

As the jurisprudence in this area is quite explicit, the court found that at the State of the City address, with only several hundred attendees, the pedestrian traffic flow concerns and the public safety concerns were not sufficiently grave and apparent as to justify summary judgment in favor of Defendants.[45]

The judge also prudently denied Plaintiff's motion for summary judgment, while still finding that her First Amendment rights had been violated, because the facts in dispute were central to the determination of liability.[46] Summary judgment is only appropriate where the facts are so clear and undisputed that no reasonable trier of fact could find for the non-moving party, which was clearly not the situation in this case.[47] Suppression of constitutional rights, especially those held as dearly as the right to free speech, is a serious matter, both for the victim of such suppression and the alleged suppressor. Thus, in denying the parties cross-motions for summary judgment in this case, the court ensured that a fair and just decision will be arrived at, after a weighing of the merits of the claims and defenses of the respective parties.[48]

CONCLUSION

Although the court found that individual defendants' actions were not narrowly applied to serve a legitimate government purpose and were thus unconstitutional violations of Plaintiff's First Amendment rights, summary judgment was not appropriate in favor of the individual defendants and the City of Providence or Plaintiff because significant material issues of fact remain to be resolved in order to justly apportion liability.[49]

Jackson Raymond Schipke

2002)).

45. *Id.* at *1.
46. *Id.* at *12–13.
47. *See id.* at *3.
48. *See id.*
49. *Id.* at *12–13.

Contract Law. *Bucci v. Lehman Bros. Bank, FSB*, 68 A.3d 1069 (R.I. 2013). The Rhode Island Supreme Court held that a nominee of a mortgage lender, who holds only legal title to the mortgage but does not hold the accompanying promissory note, may exercise the statutory power of sale and foreclose on the mortgage.[1]

FACTS AND TRAVEL

In May of 2007, Anthony Bucci and his wife ("the plaintiffs") made arrangements to finance the purchase of a home. Accordingly, they borrowed $249,900 from Lehman Brothers Bank, FSB ("Lehman Brothers"), signed a promissory note that evidenced the debt, and executed a mortgage on the property that secured the loan.[2] However, although the promissory note was made payable to Lehman Brothers, the mortgage was granted to Mortgage Electronic Registration Systems, Inc. (MERS).[3] The mortgage document provided that MERS was designated "as nominee for the lender and the lender's successors and assigns."[4]

In October 2008, the plaintiffs defaulted on the note by ceasing to make loan payments.[5] After the plaintiffs failed to cure the default, MERS initiated foreclosure proceedings and scheduled a foreclosure sale for July 10, 2009.[6] However, the day before the

1. Bucci v. Lehman Bros. Bank, FSB, 68 A.3d 1069, 1088–89 (R.I. 2013).

2. *Id.* at 1072. While only Anthony Bucci signed the note, both he and his wife executed the mortgage; "[h]owever, this fact d[id] not affect [the Court's] decision in this case." *Id.* at 1072 n.1.

3. *Id.* at 1072.

4. *Id.* at 1073. In 1993, MERS was developed by major participants in the lending community "to form a national electronic registration system that would track the transfer of ownership interests in residential loans." *Id.* at 1072. According to MERS, prior to its creation, "the constant buying and selling of mortgage-backed loans [on the secondary mortgage market] became costly and time-consuming, because each transfer required that an assignment of the mortgage be recorded in the local land evidence records." *Id.* at 1073. "In a typical MERS transaction, when a loan is made by a member of MERSCORP [the parent company of defendant MERS], the member will be designated as the lender in the promissory note, and MERS will be named in the mortgage as the mortgagee." *Id.* at 1073. This allows members of MERS to transfer title to other MERS members without having to re-record with each transfer because MERS remains as holder of the mortgage. *Id.* at 1073.

5. *Id.* at 1072.

6. *Id.* at 1074.

foreclosure sale was set to take place, the plaintiffs commenced an action seeking declaratory judgment and injunctive relief in an attempt to prevent MERS from exercising the power of sale contained in the mortgage.[7] The plaintiffs presented a variety of arguments asserting that MERS lacked the authority to foreclose.[8] The trial justice encapsulated the controversy in two inquiries: first, whether MERS had the contractual authority to foreclose under the note and mortgage, and second, whether MERS had the statutory authority to foreclose.[9] The trial justice answered in the affirmative to both questions and entered judgment on behalf of the defendants.[10] Plaintiffs appealed.[11]

ANALYSIS AND HOLDING

The plaintiffs asserted a variety of errors on appeal.[12] The Rhode Island Supreme Court addressed each of the plaintiffs' arguments after categorizing them based on whether they contested the defendant's contractual authority to foreclose or the defendant's statutory authority to foreclose.[13]

A. *Contractual Authority*

First, the plaintiffs argued that the provision of the mortgage that empowered the "Lender" to invoke the statutory power of sale precluded MERS from having contractual authority to foreclose and sell the property.[14] In agreement with the trial justice, the Rhode Island Supreme Court concluded that this language did not preclude MERS from foreclosing because another provision of the

7. *Id.* at 1074–75.
8. *Id.* at 1075–76.
9. *Id.*
10. *Id.* at 1076–77.
11. *Id.* at 1077.
12. *Id.* at 1078–79.
13. *Id.* at 1079. In addition, the plaintiffs argued that this case was moot because MERS had issued an internal policy change preventing MERS from initiating future foreclosure proceedings. *Id.* However, the Court concluded that this was "merely a voluntary cessation by MERS" because the "plaintiffs have failed to provide . . . any indication that MERS 'cannot reasonably be expected to' reinitiate foreclosure proceedings if this case were dismissed as moot." *Id.* (citation omitted). Accordingly, the case before the Court was not moot. *Id.* at 1081.
14. *Id.* at 1081.

mortgage "specifically granted the Statutory Power of Sale" and right to foreclose to MERS.[15] The Court noted that the language that granted the "Lender" power to invoke the statutory power of sale did not negate the previous language that explicitly granted MERS the right to foreclose and sell the property.[16]

The plaintiffs' second argument was that Lehman Brothers never authorized MERS to act as its nominee because Lehman Brothers did not sign the mortgage.[17] The trial justice had dismissed this argument, reasoning that Lehman Brothers would not have disbursed the loan proceeds to the plaintiffs if, in fact, it did not intend to designate MERS as its nominee.[18] The Rhode Island Supreme Court took a different route to reach the same conclusion.[19] First, the Court noted that "[a] nominee relationship is akin to that of a principle and agent," and the existence of such a relationship is a question of fact.[20] Before the trial judge, the parties had agreed to the fact that MERS was the nominee of the beneficial owner of the note.[21] Accordingly, the Court concluded that because the existence of an agency relationship is a question of fact, and the parties had previously agreed to this fact, the plaintiffs had waived their agency argument.[22]

B. *Statutory Authority*

The plaintiffs presented three arguments regarding the statutory authority for MERS to foreclose and exercise the power of sale.[23] First, the plaintiffs cited to § 18-10-1 and contended

15. *Id.* (internal quotation marks omitted).
16. *Id.*
17. *Id.*
18. *Id.* at 1077.
19. *Id.* at 1082.
20. *Id.* (citing Culhane v. Aurora Loan Servs. of Neb., 826 F. Supp. 2d 352, 370 (D. Mass. 2011)).
21. *Id.* at 1082–83. Before the trial justice, the parties had agreed to a certain portion of the affidavit of Cheryl R. Marchant, Vice President of the Aurora, the servicer of the loan. *Id.* at 1076, 1082. Within this agreed-upon portion was a paragraph that provided that "MERS, in its capacity as a mortgagee, is the nominee of the beneficial owner of the Note." *Id.* at 1082–83.
22. *Id.* at 1083.
23. *Id.*

that because MERS was not a trust company, nor a national banking association, this section precluded it from acting as a nominee.[24] The Court first provided that this argument was waived because this statute was not raised before the trial justice.[25] Nevertheless, the Court went on to conclude that even if the argument had been raised below, the section has no effect on MERS's ability to act as a nominee.[26] The Court reasoned that simply because the statute authorizes other entities to act in a nominee capacity did not necessarily preclude MERS from doing so.[27]

The plaintiffs next argued that MERS may not exercise the statutory power of sale contained in § 34-11-22 because MERS was not a true mortgagee, but instead a "nominee mortgagee," which was not contemplated by any Rhode Island statute.[28] However, the Court noted that the right to exercise the power of sale in a mortgage is not derived from statute, but rather from contract.[29] Therefore, in order to protect the liberty of contracting, the agreement "shall be held valid and enforced in the courts[] unless a violation of the law or public policy is *clear and certain*."[30] Given that the designation of MERS as grantee of the mortgage was not a "clear and certain" violation of §34-11-22, the Supreme Court held that MERS was the mortgagee.[31]

The plaintiffs' final assertion conceded that MERS was the mortgagee, but provided that because it did not also hold the note, it was implicitly prohibited from foreclosing or selling as legislation regulating mortgagees required there be a unity in the note holder and mortgagee.[32] As an initial matter, the Court recognized that it is no longer the case that the mortgagee and note holder are almost always the same entity.[33] The Court first

24. *Id.*
25. *Id.* at 1083–84.
26. *Id.* at 1084.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 1085 (quoting Gorman v St. Raphael Acad., 853 A.2d 28, 38 (R.I. 2004) (alteration in original) (internal quotation marks omitted)).
31. *Id.* at 1085.
32. *Id.*
33. *Id.* at 1086. When the statutes were originally enacted, the mortgagee and note holder were almost always the same entity, but due to

found support within the definitions of nominee and note owner. While a nominee "holds bare legal title," the note owner "retains the beneficial interest, or equitable title, in the mortgage."[34] Citing the United States Court of Appeals for the First Circuit, the Court noted that "[t]he law contemplates distinctions between the legal interest in a mortgage and the beneficial interest in the underlying debt. These are distinct interests, and they may be held by different parties."[35] Therefore, the Court concluded that the note and the equitable interest in the mortgage remained unified, as the lender retained equitable title to the mortgage and passed that equitable title to each of its successors and assigns.[36] In addition, the Court noted that MERS was the holder of the legal title to the mortgage, and has always acted as an agent of the owner of the equitable title.[37] Accordingly, as the holder of legal title, MERS may foreclose on behalf of the note owner, but the proceeds from such a foreclosure sale are a part of the beneficial interest belonging to the owner of the note.[38]

COMMENTARY

The Rhode Island Supreme Court rightfully concluded that a nominee of a mortgage lender, without holding the accompanying promissory note, may exercise the statutory power of sale and foreclose on the mortgage. In an ever-changing world, the laws must be able to adapt without allowing nonmaterial distinctions to have a material impact. In reality, when a mortgagor defaults on their loan, does it matter to the mortgagor whether the "Entity A" or "Entity B" initiates foreclosure proceedings and invokes the statutory power of sale?

The answer to that question is likely, "that depends." If

the modernization of the world of lending, this is no longer the case. *Id.*

34. *Id.* at 1087.

35. *Id.* at 1087–88 (citing *Culhane*, 708 F.3d at 292) (internal quotation marks omitted).

36. *Id.* at 1088–89.

37. *Id.* The Court noted a policy reason for finding this agency relationship; citing the Restatement (Third) Property §5.4 cmt. e., it noted that "Courts should be vigorous in seeking to find such a relationship, since the result is otherwise likely to be a windfall for the mortgagor and the frustration of [the note owners]'s expectation of security." *Id.* at 1089.

38. *Id.*

certain policies are followed, then aside from some initial confusion for the mortgagor and perhaps different procedures to follow based on which entity initiates foreclosure proceedings, there may not be very much of an issue. Of course, as noted by the Rhode Island Supreme Court, MERS does provide some benefits, including the easier buying and selling of mortgage-backed loans in the secondary mortgage market.[39] Additionally, if these nominee mortgagees were not permitted to exercise the right to foreclose and statutory power of sale, this would allow for some tremendous windfalls for mortgagors with MERS-type lending transactions across the country.[40]

However, when document-recording policies within MERS are not followed or are otherwise insufficient, some significant problems can surface. For example, in a bankruptcy case, due to "issues surrounding [an] assignment from MERS," Wells Fargo was unable to prove how it acquired the note at issue, and as a result, that it owned the note.[41] That case makes it evident that strict adherence to recording regulations must be had; otherwise, the MERS System will provide more troubles than its convenience is worth.

CONCLUSION

The Rhode Island Supreme Court held that the legal interest and equitable interest in a mortgage may be held by different parties without breaking the unity between the note holder and mortgagee. Further, a nominee of a mortgage lender, who holds only legal title to the mortgage, but who is not holder of the accompanying promissory note, may exercise the statutory power of sale and foreclose on the mortgage.

Aaron F. Nadich

39. *Id.* at 1073.
40. *Id.* at 1088.
41. *See In re* Mims, 438 B.R. 52, 56–57 (Bankr. S.D.N.Y. 2010). Consequently, the court held that Wells Fargo did not have standing to bring its claim. *Id.*

Contract Law. *The Law Firm of Thomas A. Tarro, III, et al. v. Maria Checrallah, et al.*, 60 A.3d 598 (R.I. 2013). An attorney and law firm sued a former client, alleging breach of contract, as the former client had retained the attorney and law firm on a contingent fee basis to secure a settlement agreement, but failed to pay the attorney. The Rhode Island Supreme Court affirmed the Superior Court's grant of summary judgment in favor of the attorney and law firm.

FACTS AND TRAVEL

In March 1989, Maria Checrallah (the "Defendant"), hired Thomas A. Tarro (the "Plaintiff") to "prosecute and settle all claims for damage against [her father's estate] and [her brother] or others who shall be liable on account of the handling of [her father's estate] before and after his death."[1] The Defendant agreed to pay Plaintiff fifteen percent of any monies recovered in prosecuting or settling her claims.[2] Plaintiff negotiated a settlement of the Defendant's claims with Victory Finishing Technologies, Inc. (hereinafter "Victory") for $2,390,000.[3] After securing the settlement, Plaintiff set up a distribution between the two beneficiaries of the estate (the Defendant and her brother), and began to act as a collection agent for the Defendant.[4] At this point, the Plaintiff and Defendant agreed the Plaintiff would continue his representation of the Defendant in any matters relating to the estate and the settlement.[5]

Over the next decade, Victory made payments on the settlement; pursuant to their agreement, fifteen percent of each payment went to Plaintiff as his fee.[6] After 1999, Victory entered into receivership, and the estate filed claims in the receivership proceeding in an effort to secure the payment of the settlement.[7] As a part of the receivership proceeding, in February of 2002, Plaintiff served Victory's receiver with notice of his attorney's lien for the amounts still owed to the Defendant.[8]

1. Tarro v. Checrallah, 60 A.3d 598, 599 (R.I. 2013).
2. *Id.*
3. *Id.*
4. *Id.* at 599–600.
5. *Id.* at 600.
6. *Id.*
7. *Id.*
8. *Id.*

In July of 2002, the Defendant discharged the Plaintiff from his duties as her attorney and retained new counsel.[9] Three years later, in 2005, the Defendant and successor counsel made a final settlement agreement with Victory regarding the promissory note.[10] The Defendant accepted a payment of $1,250,000 as payment of her claim, with $100,000 payable within ninety days of the agreement, and the balance due by August 2007.[11] An amendment to the final settlement mandated $200,000 be paid by August 2006, with the balance being due by August 2007.[12]

The Plaintiff moved to enforce his attorney's lien and received fifteen percent of this $200,000 payment, initially deposited within the Registry of the Court, later released to the Plaintiff by the Superior Court.[13] It is undisputed that the final payment of $950,000 was made to the Defendant in time, and that the Plaintiff never received a portion of either the initial $100,000 payment or the final $950,000 payment.[14]

Accordingly, the Plaintiff filed suit alleging breach of contract and other related actions against the Defendant, requesting fifteen percent of the $100,000 and $950,000 payments.[15] The Defendant responded, filing a counter claim that the Plaintiff had breached his representation agreement by failing to provide "effective and zealous representation," as well as alleging malpractice; these counterclaims were disposed of by summary judgment in favor of the Plaintiff.[16] The Plaintiff then moved for summary judgment on its own claims.[17]

At a Superior Court hearing on the summary judgment motion, the Defendant argued that the Plaintiff was not entitled to a contingency fee for the receivership settlement, as he was discharged prior to the negotiation of that settlement and recovery should be limited under *quantum meruit* for the value of services rendered.[18] The Superior Court then granted summary judgment

9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* n.4.
14. *Id.*
15. *Id.*
16. *Id.* at 600–01.
17. *Id.*
18. *Id.* at 601.

for the Plaintiff, holding that the Plaintiff earned fifteen percent of any amounts recovered by the Defendant when the 1989 settlement was negotiated.[19] Plaintiff was awarded fifteen percent of the receivership settlement negotiated by successor counsel as well as prejudgment interest. After the entry of final judgment, the Defendant appealed to the Rhode Island Supreme Court.[20]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court reviews the Superior Court's grant of summary judgment *de novo*, affirming "only if, after reviewing the admissible evidence in the light most favorable to the nonmoving party" the Court concludes that "no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law."[21] The non-moving party cannot rely upon allegations or denials in pleadings and must prove the existence of disputed facts by competent evidence.[22] The Defendant contended that although the material facts of the case were not disputed, the Plaintiff was not entitled to judgment as a matter of law, because the successor counsel actually negotiated the final settlement after Victory entered receivership.[23] Additionally, in the event the Plaintiff succeeded, the Defendant urged the Court to limit the Plaintiff's recovery under *quantum meruit*, allowing recovery only for the value of services rendered.[24]

The Rhode Island Supreme Court began its review noting that clients have the right to discharge their attorneys at will, although in doing so clients may be subject to consequences for breach of contract.[25] The Court held that the major distinction between recovery in contract and recovery under *quantum meruit* lies in the amount of performance of attorney's services completed prior to discharge.[26] Recovery for the reasonable value of services

19. *Id.*
20. *Id.*
21. *Id.*; *see* Great American E & S Insurance Co., 45 A.3d 571, 574 (R.I. 2012).
22. *Tarro*, 60 A.3d at 601; *see* Narragansett Improvement Co. v. Wheeler, 21 A.3d 430, 438 (R.I. 2011).
23. *Tarro*, 60 A.3d at 602.
24. Id.
25. *Id.*; s*ee* Lake v. Winfield Fuller Co., 173 A. 119, 120 (R.I. 1934).
26. *Tarro*, 60 A.3d at 602.

rendered under *quantum meruit* is always allowable after discharge without cause; specifically, recovery is limited to this form when an attorney is discharged without cause prior to the full performance of all duties contemplated in an agreement.[27] Where an attorney has substantially performed the duties set forth in an agreement though, the appropriate remedy is in contract and will be found in the expected benefit of the bargain.[28] This expectancy can only be satisfied if the agreed contingent fee is paid in full.[29]

Turning to the facts of this matter, the Court found that there was no dispute, as the Plaintiff agreed to represent the Defendant in the probate proceedings for her father's estate, and he would receive fifteen percent of any amount recovered.[30] The Court examined the retainer agreement and concentrated on the express provision that the Plaintiff would be paid "[f]ifteen (15%) [p]ercent of whatever may be *recovered* from said claim by suit, settlement or any other manner."[31] The Court then found that when the Plaintiff reached the original probate settlement, he had performed his duties to the Defendant under the agreement and became entitled to his full contingent fee; the discharge of his services after this point did not affect his right to the full fee.[32] The Court concluded by dismissing the Defendant's contention that separate collection efforts conducted by successor counsel diminished the Plaintiff's right to his fee and affirming the Superior Court's grant of summary judgment to the Plaintiff.[33]

27. *See id.*; Fracasse v. Brent, 494 P.2d 9, 10 (Cal. 1972).

28. *Tarro*, 60 A.3d at 602.

29. *Id.* The Court noted that other jurisdictions have also held that if an attorney substantially performs under a contingent fee agreement, then the contract remedy of the expected benefit of the bargain is the correct remedy. *Id.* at 603; *see also* Zaklama v. Mount Sinai Medical Center, 906 F.2d 650, 652–53 (11th Cir. 1990); McCullough v. Waterside Associates, 925 A.2d 352, 355–57 (Conn. App. Ct. 2007); MacInnis v. Pope, 285 P.2d 688, 689–90 (Cal. Ct. App. 1955).

30. *Tarro*, 60 A.3d at 603.

31. *Id.* (emphasis in original).

32. *Id.*

33. *Id.*

COMMENTARY

The Rhode Island Supreme Court reached the correct result in this case. The Defendant sought to deny the Plaintiff a contracted fee after the Plaintiff had completed the duties contemplated by their agreement. To reach another result would be to deny the Plaintiff a vested right under the terms of the agreement between the parties. Additionally, to rule in favor of the Defendant would lead to parties retroactively altering the terms of a contingent fee agreement, which would undermine the integrity of any contingent fee arrangement. Parties should not be allowed to alter fees already earned as the appropriate time for such negotiation is during the period in which a retainer agreement is created.

The Rhode Island Supreme Court's decision is founded on traditional contract principles, and the Court's affirmation of summary judgment, a "drastic remedy" that is dealt with cautiously,[34] sends a clear message—the integrity of contingent fee agreements will be respected. The Rhode Island Supreme Court was most interested in upholding the retainer agreement as written and signaled it may have gone even further than the Plaintiff requested by awarding damages in excess of what the Superior Court awarded.[35] The material facts not being in dispute, the Court faced a choice between upholding a traditional right to recovery, or the *de facto* abrogation of an agreement. Affirming the Superior Court's grant of summary judgment made it clear that the Court will not encourage parties to seek judicial rewriting of substantially performed retainer agreements.

The enforcement of contracts is critical to commerce and personal transactions of all sizes and shapes.[36] Altering in any way the agreed terms of the parties would destroy a deal arrived at by equals and consonant with well established contract law.

34. *Tarro*, 60 A.3d at 601 (citation omitted).

35. *See Tarro*, 60 A.3d at 603–04 n.6.

36. *See* 1 SAMUEL WILLISTON, ON CONTRACTS §1.1 (Richard A. Lord ed., West 4th ed. 2007) ("Contract law is designed to protect the expectations of the contracting parties. It is intended to enforce the expectancy interests created by the parties' promises so that they can allocate risks and costs during their bargaining."); 1 E. ALLAN FARNSWORTH, ON CONTRACTS 6 (Aspen, 3d ed. 2004) ("Exchange is the mainspring of any economic system that relies as heavily on free enterprise as does ours.").

The Defendant did not allege anything beyond a failure to perform. The Court correctly granted summary judgment because there were no facts whatsoever indicating an actual controversy about whether performance was made by the Plaintiff. This judgment made it clear that contracting parties cannot avoid their obligations on bare allegations unsupported by fact.

The case does, however, raise legitimate concerns. The Court's decision here means that prospective clients seeking to retain counsel need to be aware, in advance of signing any agreement, that there is little doubt it will be judicially enforced if necessary. The Court's decision made clear that, when balancing the interests of an attorney being paid for work performed and a client's desire to limit payment to value received, the client's interests will be overcome by the need for certainty in contract enforcement.

CONCLUSION

The Rhode Island Supreme Court held that an attorney who has substantially performed duties under a retainer agreement is entitled to the full fee assigned to him by that agreement, even if he is subsequently discharged. The Court determined that subsequent alteration of a settlement agreement by a successor counsel does not affect the original attorney's rights to their full fee.

Matthew Provencher

Criminal Law. *State v. Brown*, 62 A.3d 1099 (R.I. 2013). A defendant contended that it was an error for the trial court justice to decline to (1) conduct a post-trial evidentiary hearing to determine whether or not the jury was racially biased and if this was an improper extraneous influence as well as if the jurors engaged in misconduct, (2) allow all fifteen members of the jury to participate in deliberations, and (3) permit jury instructions that a defense to disorderly conduct charges could be found if police were excessively aggressive. The Rhode Island Supreme Court held that, except for under rare circumstances, jurors' racial bias does not constitute "extraneous prejudicial information" calling for review as prescribed by Rule 606(b).

FACTS AND TRAVEL

In July of 2003, the Narragansett Indian Tribe ("the Tribe") and the Rhode Island State Police engaged in an altercation as a result of which seven Tribe members, including Hiawatha Brown ("Brown"), were arrested.[1] Brown was charged with one count each of simple assault, resisting arrest, and disorderly conduct.[2]

At the trial court level, the jury originally consisted of sixteen individuals: three racial minorities and thirteen non-minorities.[3] A minority juror, however, became ill and was subsequently discharged from service, leaving only two minority jurors on a panel totaling fifteen individuals.[4] Upon the completion of testimony, the trial justice denied Brown's motion requesting that the jury instructions provide that disorderly conduct is defensible if state actors used excessive force during the altercation.[5]

Brown requested that all members of the jury be allowed to participate in deliberations, or alternatively, if only granted a twelve panel jury, that both minorities be guaranteed members.[6] The State objected to these requests.[7] The trial justice denied both of Brown's requests, reasoning that she neither had the authority to allow all fifteen jurors to deliberate if the State

1. State v. Brown, 62 A.3d 1099, 1102 (R.I. 2013).
2. *Id.* at 1102.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

objected nor to provide a guaranteed slot on the empaneled jury for the minorities.[8] Once the twelve-person jury was assembled, only one minority remained.[9]

During the course of jury deliberations, the trial justice received a series of three notes from the jury.[10] The first expressed concern over a juror who refused to find any defendant guilty due to the state police's actions; the second, sent hours later, informed the judge that the jury was deadlocked on the majority of the charges and requested that she clarify the law regarding self-defense; the third stated that the jury was hung regarding all sixteen charges.[11]

Upon close of deliberations that day, the deputy sheriff saw a group of jurors "lagging behind . . . speaking" quietly.[12] He approached them and informed them that they were not allowed to discuss the case unless all jurors were present, as he felt that one of the jurors was pushing his opinion on the others.[13] Due to the deputy's suspicions, the judge individually interviewed several jurors who had been observed taking part in the conversation.[14] Each denied that they were discussing the case, but rather admitted to speaking about motivations, frustrations, dispositions, and personality conflicts.[15] After receiving a "pep talk" from the judge, the jury convicted Brown of disorderly conduct and simple assault but acquitted Brown of the charge of resisting arrest.[16]

Approximately one month later, Brown moved for a new trial stating that, subsequent to the close of trial, he discovered

8. *Id.* at 1102–03.
9. *Id.* at 1103.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.* at 1103–04. As a result, Brown made two motions: (1) for a mistrial, reasoning that jury deliberations had broken down, or in the alternative, (2) for the removal of the juror who was pressuring his opinion on the other jurors outside of deliberations. *Id.* at 1104. The State objected to both motions based on the statements from the jurors that they had not discussed the case except during deliberations. *Id.* The trial justice, relying on statements from the jurors and the fact that he sheriff had only seen the jurors talking, but had not heard the content of their conversation, found that she had no proper basis from which she could either declare a mistrial or find that one juror had "tainted" the others. *Id.*
16. *Id.* at 1104–05.

evidence that his right to a fair trial was obliterated as misconduct occurred during juror deliberations.[17] In support of this motion, Brown submitted three affidavits discussing juror hostility from three jurors.[18] These jurors had contacted Brown's counsel after trial.[19]

The first affidavit, from juror one, the self-identified minority juror, expressed concern that two other jurors had a "joint agenda" and that jurors were biased against Brown and his co-defendants.[20] The juror pointed to several incidents to substantiate her claim.[21] For example, she noted that the jury foreperson sent the first note to the judge without asking for "input or approval" from any of the other jurors.[22] Additionally, when the Tribe's Chief was testifying, a juror questioned, "Why did they stand up? He's nothing."[23] Further, another juror asked during jury deliberations, "Who are those people to touch a police officer?"[24]

Juror two was afraid that two other jurors spoke about the case outside of deliberations, although she admitted to not having heard any discussions and, thus, her apprehension was based solely from watching their behavior throughout the course of the trial.[25] Juror two reiterated the claims made in the first affidavit, that a juror referred to the defendants as "those people" in regard to the statement made about touching a police officer and that the foreperson sent the judge a note without first consulting her.[26] Juror two also stated that when the jury reached a verdict, one of the two jurors whose conduct was allegedly questionable banged two water bottles together like he was playing a "tom-tom"

17. *Id.* at 1105. This motion was made pursuant to Rule 33 of the Superior Court Rules of Criminal Procedure by which a defendant can move for a new trial based on new evidence discovered up to three years after judgment is entered. *Id.*

18. *Id.* For the rest of this survey, these jurors will be referred to as jurors one, two, and three, respectively.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 1106.

24. *Id.*

25. *Id.*

26. *Id.*

drum.[27]

Juror three stated that the two jurors whose conduct was in question had a disrespectful disposition toward the defendants but "never used any racial epithets."[28] Juror three noted that he remembered the tom-tom incident and found it disrespectful; he noted that the jury was not consulted regarding the content of the first note the foreperson sent to the judge.[29] Juror three also speculated that the two jurors in question discussed the case outside of deliberations.[30]

In June of 2008, the trial court held a hearing on Brown's motion for a new trial to determine if an evidentiary hearing was needed.[31] Brown argued that the affidavits evidenced juror bias, contained comments that "could be determined to be racially motivated," and proved misconduct; an evidentiary hearing was therefore necessary.[32] The State, however, opposed the hearing, insisting that Brown's motion was grounded in "speculation" and mere "interpretations" of other jurors' actions (but not racial bias or epithets), and thus did not show any extraneous information had compromised the jury deliberation process.[33] Accordingly, the State argued that the affidavits were inadmissible as evidence pursuant to Rhode Island Rules of Evidence 606(b).[34] The trial justice denied Brown's motion for a new trial, agreeing with the arguments advanced by the State.[35] However, she noted that "this Court's precedent provided little guidance on the issue of whether the affidavits constituted a sufficient showing of racial bias to warrant an evidentiary hearing," but ultimately concluded

27. *Id.*
28. *Id.* (internal quotation marks omitted).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.* (internal quotation marks omitted).
33. *Id.*
34. *Id.* at 1106. This rule prohibits a juror from testifying to any statement, matter, or to anything upon their or another juror's mind or emotions which influenced them to assent or dissent from the indictment or verdict, or to their mental processes, which occurred during jury deliberations, during any inquiry conducted regarding the validity of an indictment or verdict; it further prohibits a juror's affidavit or evidence of a juror's statement regarding any matter from which they would be precluded from testifying to be used for such purposes. *Id.*
35. *Id.* at 1107.

that the conduct included in the documents was ambiguous and did not grant the motion.[36] In July of 2008, Brown appealed to the Supreme Court of Rhode Island, arguing that the trial court should have conducted the evidentiary hearing, granted his request to allow of the jurors to deliberate, and provided the jury with his proffered instruction regarding disorderly conduct.[37]

ANALYSIS AND HOLDING

A. *Juror Misconduct*

A juror may, pursuant to Rule 606(b), testify regarding jury deliberations regarding whether "extraneous prejudicial information" or "any outside influence" played an improper role on influencing any juror, despite the general protections afforded to the secrecy of the deliberative process.[38] The Court noted that although the rule was enacted to advance termination for the litigation process as well as finality to judgments, these policies must be balanced against a defendant's right to a verdict based exclusively on the evidence presented within the context of the trial and courtroom.[39]

In the course of such review, an issue of first impression for the Court arose: whether the racial bias of jury members constitutes "extraneous prejudicial information" or "outside influence" which may properly be testified to under Rule 606(b).[40] Thus, the Court deferred to federal case law for guidance and agreed with the First and Tenth Circuits that a juror's racial bias does not fall within the rule's prescribed definition of "extraneous prejudicial information" or "outside influence."[41] However, the Court agreed with the First Circuit that occasionally juror testimony should be admitted to resolve the question of whether the defendant received a fair trial where ethnic or racial prejudice is involved.[42]

36. *Id.*
37. *Id.* at 1107–08.
38. *Id.* (internal quotation marks omitted).
39. *Id.*
40. *Id.*
41. *Id.* at 1109–10 (citations omitted).
42. *Id.* at 1110. Contrarily, the United States Court of Appeals for the Tenth Circuit held that "jury perfection" was unrealistic, and as features of

The Court held that the decision as to whether such an inquiry should be conducted is within the discretion of the trial judge, who is most familiar with the facts and circumstances of the case and those participating in the process.[43] The Court determined that, because the jury (1) acquitted each of Brown's codefendants on at least one charge and (2) convicted Brown while acquitting him of one charge, the evidentiary hearing was needless as the jury must have scrutinized the circumstances surrounding each individual charge to produce such outcomes, obliterating Brown's allegation of a biased jury.[44] The Court categorized the jurors' conduct as "impolite" and "ambiguous" but lacking a definite "racist undertone" sufficient to substantiate Brown's argument that his conviction was a result of his racial background as it was "capable of different interpretations."[45] Further, as none of the jurors openly articulated racial slurs or recommended that Brown's race or ethnicity should play a role in their analysis, the Court agreed with the trial judge's determination that an allegation of racial bias was speculative at best.[46]

The Court also addressed two instances of non-racially related juror misconduct which include the note that was sent to the trial justice without the knowledge of the other jurors and the discussion of the case outside of the context of deliberations by two jurors.[47] The Court affirmed the denial of Brown's motion for a new trial based on these allegations of misconduct because they did not advance any indication that jury deliberations were polluted with banned extrinsic evidence, and the trial justice ignored the note upon receipt.[48]

B. *Selection of Deliberating Cohort of Jurors*

Brown argued on appeal that the trial court committed

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the litigation process serve to protect the defendant's right to a fair trial, the need to allow evidence of post-verdict testimony from jurors to protect that right is non-existent. *Id.* at 1109 (citation omitted).

43. *Id.*
44. *Id.*
45. *Id.* at 1110–11.
46. *Id.* at 1111.
47. *Id.*
48. *Id.*

reversible error in denying his request to allow all fifteen members of the jury to participate in deliberations as well as in failing to demand that the State provide a "race-neutral reason" for objecting to a jury deliberation panel of fifteen individuals.[49] The Court reasoned that a defendant in a criminal case does not have a right to any specific individual on a jury.[50] Additionally, pursuant to Rule 24(c)[51] of the Superior Court Rules of Criminal Procedure, only twelve jurors proceed to deliberations unless the parties can agree upon another number, and in this case, the State did not agree.[52] The Court noted that its objection makes sense considering that the verdict must be unanimous, and the State has the burden of proof.[53] Since the jurors who proceed to deliberations are chosen randomly, the Court held that no special race-sensitive protections are necessary as the process is inherently "color-blind."[54] Accordingly, the Court rejected both of Brown's arguments regarding the juror cohort.

C. *Proposed Jury Instructions*

Finally, Brown contended that he was entitled to a jury instruction that he could not be found guilty on the charge of disorderly conduct if the jury found that the police were the party

49. *Id.*
50. *Id.* at 1112.
51. The pertinent portion of the rule states:

> The court in its discretion may direct the impaneling of a jury not to exceed sixteen (16) members, all having the same qualifications and impaneled and sworn in the same manner as a jury of twelve (12). If a juror is excused after he or she has been sworn but before any opening statement is begun, another juror may be impaneled and sworn in his or her place. All the jurors shall sit and hear the case, but the court for cause may excuse any of them from service provided the number of jurors is not reduced to less than twelve (12) or such other number stipulated to under Rule 23(b). If more than such number remain at the conclusion of the court's charge, the clerk in the presence of the court and the parties shall put the names of the remaining jurors in a box and from it shall draw twelve (12) names, or such other number stipulated to by the parties, to determine the issues.

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52. *Brown*, 62 A.3d at 1112.
53. *Id.*
54. *Id.*

responsible for initiating the altercation which ultimately led to his arrest.[55] The Court failed to identify any precedent that supported Brown's assertion, and therefore concluded that the trial justice did not err in denying to administer such an instruction.[56]

COMMENTARY

While it is shameful that racial and ethnic prejudice may still be a rampant issue today, the Supreme Court of Rhode Island, in handling this issue on first impression, has rightfully expressed legitimate concerns regarding the introduction of evidence of racial bias as extraneous prejudicial information on a jury verdict while recognizing the importance of ensuring the federally and state guaranteed right to fair trial.

Examples of extraneous influences upon a jury that are admissible into post-verdict testimony regarding jury deliberations include "jurors reading news reports about the case, jurors communicating with third parties, bribes, and jury tampering."[57] All of these share the characteristic of constituting affirmative actions, posing a clear distinction from possessing a racial bias, which does not necessarily have a blatant active component. Simply because one does not openly express a prejudice does not mean it does not exist.[58] In a world of arguably increasing racial tension, there has been a push by some to allow evidence of racial bias to be presented before an evidentiary hearing to ensure a defendant's right to a fair trial has not been violated;[59] this view can be summarized as embodied by a

55. *Id.*

56. *Id.* at 1112–13.

57. Pond, Note, *Juror Testimony of Racial Bias in Jury Deliberations: United States v. Benally and the Obstacle of Federal Rule of Evidence 606(b)*, BYU L. REV. 244 (2010).

58. *See* Richard Gabriel, *Race, bias and the Zimmerman jury*, CNN (July 16, 2013), http://www.cnn.com/2013/07/16/opinion/gabriel-bias-zimmerman/.

59. *See* Amanda R. Wolin, Comment, *What Happens in the Jury Room Stays in the Jury Room . . . but Should It?: A Conflict Between the Sixth Amendment and Federal Rule of Evidence 606(b)*, 60 UCLA L. REV. 262, 289–93 (2012); *See Circuit Split: Ensuring Racial Bias Is Not A Basis For The Jury's Deliberations*, FED. EVIDENCE REV. (Mar. 19, 2013), http://federalevidence.com/blog/2013/march/ensuring-racial-bias-not-basis-jurys-deliberations-draft.

statement made by D. Grayson Yeargin, Washington, D.C.'s co-chair of the ABA Section of Litigation's Criminal Litigation Committee's: "You have to look under the hood now and then to make sure the jury is functioning as it should."[60]

However, this view is not shared by all. Many courts still refuse to make an exception to Rule 606(b) for evidence of racial bias. Further, issues would arise regarding other prejudices, such as how the disabled would fit into such an analysis of exceptions. A concern seems to be a line drawing problem: if racial bias becomes an external as opposed to internal distinction, what would stop any inappropriate comments or actions occurring during deliberations from being classified as external, thus becoming admissible,[61] and thereby destroying the longstanding principle of the jury as a black box?[62] Despite the process of *voir dire*, it is impossible to truly determine the inner thoughts and prejudices which a person harbors unless they explicitly manifest outward actions to project such feelings. Additionally, allowing a probative venture into one's possible racial prejudice would essentially sponsor an exploratory mission into the mental processes of a juror, which violates the widespread notions of deference to a rendered verdict. As such, the Rhode Island Supreme Court's hesitance in this area appropriately betokens its acknowledgment of the vast difficulties presented by the possibility of allowing racial bias evidence to be considered under a Rule 606(b) review of a verdict that the judiciary may not currently be logistically nor ideologically suited to handle.

CONCLUSION

The Supreme Court of Rhode Island affirmed the trial court's determination that a juror's racial bias does not fall within Rule 606(b)'s definition of "extraneous prejudicial information" or an "outside influence." However, the court concluded that jurors'

60. Jannis E. Goodnow, *Investigating a Juror's Claim of Racial Bias*, LITIGATION NEWS: FROM THE ABA SECTION OF LITIGATION (July 18, 2013), http://apps.americanbar.org/litigation/litigationnews/mobile/article-racial-bias.html.

61. *See* Pond, *supra* note 57, at 244.

62. *See* Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 165, 176–77 (2011).

racial bias may be admissible under rare circumstances when necessary to ensure that a defendant received a trial void of a jury which was not impartial but instead biased against him due to his race or ethnicity, that only twelve jurors are to deliberate unless the parties can agree, and that provoking a defendant does not entitle him to a jury instruction of defense to disorderly conduct.

Dana N. Weiner

Criminal Law. *State v. DeRobbio*, 62 A.3d 1113 (R.I. 2013). In an unprecedented interpretation of the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, the Rhode Island Supreme Court held that a dismissal of charges under the Act is premature absent an evidentiary hearing at which each defendant has the burden of proving that he was in possession of an amount of medical marijuana that conforms to the limits set forth in the Act.

FACTS AND TRAVEL

On January 21, 2010, Cranston police detectives surveilled defendant Dean DeRobbio's ("DeRobbio" or "Defendant") home prior to executing a search warrant.[1] When DeRobbio and co-Defendant, Joseph Joubert ("Joubert" or "co-Defendant") exited the home, a Cranston police officer was directed to stop their vehicle.[2] At this time, the officer notified the Defendants that he had a warrant to search DeRobbio's home.[3] Both Defendants then presented the officer with registry identification cards that were issued to them under the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act, G.L.1956 chapter 28.6 of title 21 ("the Act").[4] The identification cards listed DeRobbio as a patient and Joubert as his primary caregiver.[5] Joubert's identification card indicated that DeRobbio was his only patient.[6]

After searching DeRobbio's home, Cranston police discovered "thirty-three marijuana plants; thirty-nine marijuana seedlings without any visible buds; 31.8 grams of marijuana in a plastic container in [DeRobbio's] freezer; thirty-nine and six-tenths grams of marijuana in a plastic freezer bag in the bedroom, two and four-tenths grams of marijuana in a sandwich bag; [and] twelve and one-tenth grams of 'burnt' marijuana in a prescription bottle."[7]

1. State v. DeRobbio, 62 A.3d 1113, 1114 (R.I. 2013).
2. *Id.*
3. *Id.*
4. *Id.* at 1114–15. Under the Act, a "registry identification card" is a document issued by the Rhode Island Department of Health that identifies a person as a registered qualifying patient or a registered primary caregiver. *Id.* at 1115 n.3.
5. *Id.* at 1115.
6. *Id.*
7. *Id.* Police also found 40 Vicodin tablets throughout DeRobbio's home. *See id.* The legality of this search was not challenged by Defendants on

Police reports stated that the mature marijuana plants and seedlings were found in two separate "grow rooms" located in DeRobbio's basement.[8] A total of eighty-five and nine-tenths grams of marijuana was found in DeRobbio's home, which is equivalent to approximately 3.03 ounces of usable marijuana.[9]

Police also found another registry identification card in DeRobbio's home that was issued to Joubert's mother, Marie Joubert ("Mrs. Joubert"), and listed her as DeRobbio's primary caregiver.[10] Police contacted Mrs. Joubert in reference to the marijuana found in DeRobbio's home and, according to police, she stated that she knew about the marijuana plants located in DeRobbio's home and that twenty-four of the plants belonged to her, though she could not specify which ones because she had not actually witnessed them growing, nor had she ever been inside of DeRobbio's home.[11] She indicated that she was growing the marijuana for two of her patients, DeRobbio and another whose name she could not remember.[12]

On June 7, 2010, as a result of the search of DeRobbio's home, Defendants were charged with possessing marijuana with intent to deliver in violation of Rhode Island's Uniform Controlled Substance Act ("CSA"), G.L.1956 § 21-28-4.01(a)(4)(i), manufacturing marijuana in violation of the same provision, and conspiracy to violate the CSA.[13] On January 5, 2011, DeRobbio moved to dismiss all counts, citing the affirmative defense and dismissal provision set forth in the Act.[14]

Enacted in 2006 "to protect patients with debilitating medical conditions, and their physicians and primary caregivers, from arrest and prosecution, criminal and other penalties, and property

appeal. *Id.* at 1115 n.4.

8. *Id.* The two rooms were windowless and contained "fans, timers, high-wattage lights, humidifiers, a ventilation system, filters, and a calendar with a schedule indicating when to care for the plants." *Id.*

9. *Id.* at 1115 n.5. This translation is relevant because the Act quantifies "usable marijuana" in terms of ounces, not grams. *Id.*

10. *Id.* at 1115.

11. *Id.*

12. *Id.* Mrs. Joubert was not charged in connection with this matter. *Id.*

13. *Id.* at 1114. DeRobbio was also charged with committing a crime of violence while having an available firearm in violation of § 11-47-3 and with unlawful possession of Vicodin in violation of § 21-28-4.01(c)(2)(i), both of which are not discussed in this case. *Id.*

14. *Id.* at 1115. Joubert later joined in this motion. *Id.*

forfeiture if such patients engage in the medical use of marijuana,"[15] the Act allows certain individuals identified by the Rhode Island Department of Health ("DOH") as qualifying patients to possess "an amount of marijuana that does not exceed twelve (12) mature marijuana plants and two and one-half (2.5) ounces of usable marijuana" for medical use.[16] Qualifying patients under the Act must have been diagnosed by "certain medical practitioners as having a debilitating medical condition" and must be issued a registry identification card by the DOH.[17] The Act also allows such patients to possess "a reasonable amount of unusable marijuana, including up to twelve (12) seedlings" which are not counted towards the limits laid out in the Act.[18]

Under the Act, primary caregivers[19] may also possess "an amount of marijuana which does not exceed twelve (12) mature marijuana plants and two and one-half (2.5) ounces of usable marijuana for each qualifying patient to whom he or she is connected through the [DOH's] registration process."[20] However, though a primary caregiver may assist up to five qualifying patients, at no time may he or she possess more than twenty-four marijuana plants or five ounces of usable marijuana for those patients.[21] Further, a qualifying patient may have no more than two primary caregivers.[22]

The affirmative defense and dismissal provision of the Act provides that a defendant may assert medical use of marijuana in a motion to dismiss criminal charges of possessing marijuana.[23] The Act provides that the charges shall be dismissed following an evidentiary hearing at which the defendant must show: (1) that his or her practitioner has determined in his or her professional opinion, and after having done a thorough assessment of the patient's health history and current medical condition, that the

15. *Id.*at 1115–16.
16. *Id.* at 1116 (internal quotation marks omitted).
17. *Id.*
18. *Id.*
19. *Id.* (internal quotation marks omitted). Primary caregivers are defined under the Act as "a natural person at least twenty-one years of age who has been issued a registry identification card from the DOH." *Id.*
20. *Id.* (internal quotation marks omitted).
21. *Id.*
22. *Id.*
23. *Id.*

benefits of using marijuana for medical purposes would likely outweigh the risks, and, (2) that the patient and the patient's primary caregiver, if any, were "collectively in possession of a quantity of marijuana that was not more than what is permitted under" the Act.[24]

Citing this affirmative defense and dismissal provision, Defendants argued that the amount of marijuana found in DeRobbio's home did not exceed what is collectively allowed under the Act between a patient (DeRobbio) and his two caregivers (Joubert and Mrs. Joubert).[25] Refuting the State's argument that the three collectively possessed three greater seedlings than allowed under the Act with regard to useable marijuana,[26] Defendants argued that photographic evidence provided by the State did not clearly identify which plants would constitute as seedlings and which were simply "dead leaves."[27] Further, the Defendants argued that the Act does not specify a limit to the amount of usable marijuana apart from seedlings, but rather only requires the amount of usable marijuana that is possessed aside from seedlings be "reasonable."[28]

In objecting to Defendants' motion to dismiss, the State argued[29] that Defendants violated the possession limits set forth under the Act because the Act does not allow for collective possession of marijuana among qualifying patients and primary caregivers.[30] As such, the State contended the entire amount marijuana grown and found at DeRobbio's home must be ascribed solely to DeRobbio and could not be split up between DeRobbio, Joubert, and Mrs. Joubert or viewed as being possessed collectively by the three.[31] Accordingly, the amount DeRobbio

24. *Id.* at 1116–17.

25. *Id.* at 1117.

26. The Act allows for 12 seedlings per person, so collectively the Defendants and Mrs. Joubert could lawfully possess a total of 36 seedlings. However, 39 seedlings were found in DeRobbio's home. *Id* at 1115.

27. *Id.* at 1117.

28. *Id.* DeRobbio and Joubert further argued that the language "collectively in possession" was ambiguous, and, citing precedent from the Court, argued that in cases where a criminal statute is deemed ambiguous, the criminal information should be dismissed. *Id.*

29. The State conceded that both Defendants were valid medical marijuana cardholders. *Id.*

30. *Id.*

31. *Id.*

possessed placed him in violation of the limits set forth in the Act.[32] The State also argued that none of the plants could be attributed to Mrs. Joubert as a primary caregiver because she could not specifically identify which of the plants in DeRobbio's home were hers, she did not actually grow or care for any of the plants, and she told police she had never been inside DeRobbio's home.[33]

On May 4, 2011, in a bench decision before the Superior Court, the hearing justice granted the Defendants' motion to dismiss as to the criminal charges, interpreting the Act as allowing collective possession among the Defendants and Mrs. Joubert, and thus determining that the Defendants "lawfully possess[ed] an authorized amount of marijuana plants and usable marijuana."[34] An order dismissing the charges was entered on May 16, 2011.[35] The State filed a timely appeal.[36]

On appeal, the State abandoned its argument that the Act does not provide for collective possession among qualifying patients and caregivers, but rather focused on the contention that, even assuming collective possession was allowed, the Defendants were still in violation of the limits allowed under the Act because none of the marijuana found in DeRobbio's home could be attributed to Mrs. Joubert.[37] Consequently, according to the State, the Defendants "could lawfully have possessed only twenty-four mature plants," when in fact thirty-three were discovered in DeRobbio's home.[38] The State applied the same line of reasoning to Defendants' possession of the seedlings, arguing that their possession exceeded the limits set forth in the Act because none of the seedlings could be properly attributed to Mrs. Joubert.[39]

The Defendants responded to the State's argument separately

32. *Id.* The State ascribed the same line of reasoning to Joubert, arguing that because possession could not be split up amongst the three individuals, he too was in violation of the limits set forth in the Act. *Id.* at 1117–18.

33. *Id.* at 1118.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

on appeal.[40] Joubert argued that, assuming there were multiple plausible interpretations of the statute, the hearing justice "correctly interpreted the Act to defendants' benefit."[41] DeRobbio relied on a similar argument of lenity and added that an imposition of criminal liability under the Act would be unconstitutional because it does not provide a fair warning to criminal defendants.[42] The Act, DeRobbio argued, does not clearly or unambiguously prohibit collective growth of marijuana, nor does it specify the level of involvement or participation that each qualifying patient and primary caregiver must provide to comply with the Act.[43]

ANALYSIS AND HOLDING

In determining whether the Superior Court erred in granting Defendants' motion to dismiss, the Court looked to the plain language of the affirmative defense and dismissal provision of the Act, noting that the hearing justice was "bound by the terms of that provision."[44] Considering the terms of the provision to be "abundantly clear,"[45] the Court determined that the charges brought in a prosecution involving marijuana should only be dismissed "following an *evidentiary hearing*," that the defendant has the burden of requesting, and at which the defendant has the burden of proving that the requisite elements of the provision have been met.[46]

The Court reasoned that because no evidence regarding the requisite elements was presented by either of the parties at the Superior Court's hearing on Defendants' motion to dismiss, no evidentiary hearing was held, thus, the hearing justice's decision to dismiss the charges was "in contravention of the plain terms of

40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 1119.
44. *Id.* at 1119–20. The Court also recognized that a Constitutional question may be at issue in this case regarding whether the Act is preempted by a federal statute prohibiting the manufacture, distribution or possession of marijuana even if it is being used for medical purposes. However, since neither party raised the issue at the lower level or on appeal, the Court declined to consider whether the Act would survive preemption. *Id.* at 1119.
45. *Id.* at 1120.
46. *Id.*

the Act."[47] Regarding the dismissal as "premature," the Rhode Island Supreme Court vacated the judgment entered by the Superior Court and instructed the hearing justice to conduct an evidentiary hearing on the Defendants' motion to dismiss.[48]

COMMENTARY

The Court rightfully concluded that the plain language of the affirmative defense and dismissal provision of the Act required the Defendants to request an evidentiary hearing and prove at the hearing that the requisite elements of the provisions have been satisfied, thus warranting dismissal of criminal charges associated with the possession of marijuana. What this decision fails to address, and perhaps rightfully so, as it is not the issue before the Court, is the clear ambiguity in the language of the provision. The hearing justice recognized the ambiguity of the provision when he granted Defendants' motion to dismiss, stating that the Act "is a poorly-drafted statute . . . [and] a defendant [should not] be criminally liable for inartful draftsmanship."[49]

A further indication of the ambiguity of the statute is the State's shift in focus on its arguments between the trial and appellate levels. On appeal, the State abandoned one of its initial contentions that the Act was not intended to allow collective possession of marijuana amongst qualifying patients and primary caregivers. Abandoning this argument suggests that the State's own understanding of the statute was at best questionable.

The State's argument on appeal raises another point of ambiguity latent in the affirmative defense and dismissal provision of the Act that Defendants' response on appeal also addresses: assuming collective possession is allowed under the provision, what level of involvement must a defendant show to properly attribute possession to a qualifying patient or primary caregiver? Must a qualifying patient and primary caregiver plant, grow, care for, and harvest the marijuana for possession to be properly attributed to him or her? Or is being registered as a patient's primary caregiver enough? These questions, though

47. *Id*.
48. *Id.*
49. *Id*. at 1118.

recognized in the Court's opinion, remain unanswered following this decision.

The decision does, however, provide precedent on an important procedural aspect of the Act by irrefutably requiring that any defendant seeking to invoke the defense and dismissal provision of the Act request an evidentiary hearing, and subsequently prove at the hearing that the requisite elements of the provision have been met. Though seemingly apparent from the plain language of the provision, there was obviously some question as to the necessity of the evidentiary hearing if the Rhode Island Supreme Court had to speak on the issue. Following this decision, that question has been affirmatively resolved.

CONCLUSION

The Rhode Island Supreme Court held that the plain language of the affirmative defense and dismissal provision of the Edward O. Hawkins and Thomas C. Slater Medical Marijuana Act provides that dismissal of charges in prosecution involving marijuana is only appropriate after an evidentiary hearing at the request of the defendant, and at which, each defendant has the burden of proving that the two requisite elements of the affirmative defense and dismissal provision have been met.

Meghan L. Kruger

Criminal Law. *State v. Hazard*, 68 A.3d 479 (R.I. 2013). The Rhode Island Supreme Court concluded that under the Firearms Act statutory definition, for an instrument to qualify as a "firearm," it must either be capable of expelling a projectile or be readily convertible to do so. The defendant in this case, Adrian Hazard, was found to be in violation of his probation due to possession of a firearm and attempting to elude the police. As the revolver found in the defendant's car was not within the antique-firearms exemption allowed under the Firearms Act and could be readily converted to expel a projectile, it qualified as a "firearm" under the Act.

FACTS AND TRAVEL

On the evening of December 30, 2009, the Providence Police received information that there would be a firearm inside of a gold Volkswagen within their patrol area.[1] Sometime later that night, officers spotted a vehicle matching the earlier information obstructing the flow of traffic.[2] When the officers put on their cruiser lights and approached the vehicle it attempted to flee the scene.[3] This gave way to a brief chase that ended with the vehicle being cut off by another police cruiser.[4]

Upon stopping the vehicle, the officers found the defendant, Arian Hazard ("Defendant"), in the driver's seat with Carlos Washington ("Washington") in the passenger seat.[5] The two men were taken into custody, and the officers later found a replica Remington 1858 .44-caliber black powder revolver on the floor of the vehicle.[6]

At the time of his arrest, Defendant was on probation.[7] His actions on the night of December 30, 2009 gave rise to a probation-

1. State v. Hazard, 68 A.3d 479, 482 (R.I. 2013).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* Defendant was on release from prison following a plea agreement entered on November 8, 1996, where he plead guilty to one count of manslaughter and one count of carrying a pistol without a license. As a result, Defendant "was sentenced to thirty years for the manslaughter count, with fifteen years to serve and the balance suspended, with probation, and a consecutive ten-year term, suspended, with probation, for the firearms conviction." *Id.*

violation hearing.[8] At the hearing, Defendant, along with Washington and Defendant's close friend Camille Stokes ("Stokes"), gave testimony on the events of the 30th.[9] They claimed, among other things, that a police officer had approached the car with his weapon drawn and that the gun in the car belonged to Washington, who brought it unbeknownst to Defendant.[10] However, Washington's testimony was in stark contrast with the statement that he made earlier to Detective Thomas Rawnsley, immediately following his arrest.[11] There Washington acknowledged that the gun belonged to the Defendant.[12] Ultimately, the trial justice did not find these witnesses to be credible based on "inconsistencies within each of their statements" and "each hav[ing] a strong motivation to lie based on their close relationships with [D]efendant."[13]

Accordingly, the lower court discerned that the revolver belonged to the Defendant.[14] The trial justice next had to determine whether the revolver fit within the definition of either "firearm" or "pistol" under the Firearms Act ("Firearms Act" or "the Act"), chapter 47 of title 11.[15] First, the trial justice found the gun did not qualify as an antique firearm unsuitable for use under § 11-47-25.[16] Next, the trial justice was satisfied that the revolver could "be readily converted to expel a projectile," which qualified it as a "firearm" and "pistol" under the Act.[17] After announcing that Defendant had violated his probation, the trial justice ordered Defendant to serve ten years of the prior suspended sentence.[18]

Seeing as Defendant was still facing prosecution for recklessly operating a motor vehicle, carrying a revolver without a license,

8. *Id.*
9. *Id.* at 482–83.
10. *Id.*
11. *Id.* at 483.
12. *Id.*
13. *Id.* The trial justice described Washington's testimony as "a perjurious effort to take the onus off his half[-]brother." *Id.*
14. *Id.*
15. *Id. See* R.I. GEN. LAWS § 11–47–2(3) (2012); § 11–47–2(8)
16. *Hazard*, 68 A.3d at 483. Antique firearms, as defined, are "outside the ambit of the [A]ct." *Id.*
17. *Id.* at 484.
18. *Id.*

and possession of a firearm after having been convicted of a crime of violence, the state requested the trial justice revisit his earlier interpretation of the Act.[19] Through a motion in limine, the state asked the trial justice to construe the Act such that a weapon need not be able to, or be readily convertible, to expel a projectile to qualify as a "pistol" under § 11-47-2(8) and that a pistol is a per se "firearm" under 11-47-2(3).[20] Also, the state wanted a ruling that a "mere frame or receiver," regardless of whether it can expel a projectile or readily be converted to do so, constituted a "firearm" under the Act.[21] The trial justice denied this motion, holding that his initial interpretation of the Act at the probation-violation hearing was correct.[22]

Both Defendant and the state appealed, on separate grounds, to the Rhode Island Supreme Court, assigning error to the trial justice's rulings in each of the underlying cases.[23] On appeal, the Court had to decide whether there had been error in (1) the trial justice's interpretation of the Firearms Act or (2) in the conclusion that Defendant had violated his probation.[24]

ANALYSIS AND HOLDING

The Court took a two-pronged approach to the appeals, first addressing the trial justice's interpretation of the Firearms Act and then turning to Defendant's probation violation.[25]

A. *The Interpretation of the Firearms Act*

The Court first addressed the state's challenge to the trial justice's interpretation of the term "firearm," as defined by § 11-47-2(3).[26] The trial justice interpreted the language of the statute

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 484, 499.
26. *Id.* at 484. The Act defines a "firearm" as "any machine gun, pistol, rifle, air rifle, air pistol, 'blank gun,' 'BB gun,' or other instrument from which steel or metal projectiles are propelled, or which may readily be converted to expel a projectile, except crossbows, recurve, compound, or longbows, and except instruments propelling projectiles which are designed or normally

to mean that the phrase "from which steel or metal projectiles are propelled, or which may readily be converted to expel a projectile" should apply to all of the preceding instruments.[27] The state contended that under the last antecedent rule ("LAR"), which required that qualifying words and phrases be applied solely to the last antecedent in the statute, the qualifying phrase only applied to the term "other instrument" rather than all the instruments listed.[28]

The Court "review[s] questions of statutory interpretation *de novo*."[29] The "ultimate goal is to give effect to the purpose of the act as intended by the Legislature," by looking to the entire statutory scheme to interpret an ambiguous terms or those terms that, when looked at with "myopic literalism," do not coincide with the purpose of the statute as a whole.[30] Particularly, when interpreting ambiguities in penal statutes it must be done in a way that will "favor . . . the party upon whom a penalty is to be imposed."[31]

Here, the Court viewed the state's reliance on the LAR as "sensible as a matter of grammar" but not dispositive of the interpretation issue.[32] In the one previous case where the Court had invoked the LAR, it did so as an aid in reaching its final decision, not as a standalone rule.[33]

When applied to the present case, the Court found that the state's position failed on three grounds. First, the Court found that the trial justice's interpretation was the most consistent with

used for a primary purpose other than as a weapon. The frame or receiver of the weapon shall be construed as a firearm under the provisions of this section." R.I. GEN. LAWS § 11–47–2(3).

27. *Id.* at 485.

28. *Id.* at 485–86.

29. *Id.* (citing Campbell v. State, 56 A.3d 448, 454 (R.I. 2012)).

30. *Id.* (citing Alessi v. Bowen Court Condominium, 44 A.3d 736, 740 (R.I. 2012); Mendes v. Factor, 41 A.3d 994, 1002 (R.I. 2012); *In re* Brown, 903 A.2d 147, 150 (R.I. 2006)).

31. *Id.* (citing State v. Clark, 974 A.2d 558, 571 (R.I. 2009) (quoting State v. Smith. 766 A.2d 913, 924 (R.I. 2001)). This is referred to as the "rule of lenity." *Id.* at 492.

32. *Id.* at 487 (describing the LAR as flexible).

33. *Id.* (citing State v. Brown, 486 A.2d 595, 600 (R.I. 1985) (using "intent and purpose of th[e] statute" to determine the terms in their correct context)).

the structure of the entire statute.[34] Second, the Court reasoned that since the General Assembly chose to include the word "other" in the last antecedent "other instrument," it appeared to have wanted to include all the delineated instruments in a subset to which the qualifying phrase would apply.[35] If, as the state contends, the qualifying clause was only meant to apply to "other instruments" then the Legislature could have chosen to include a second "or," one to conclude the first subset and another to which the qualifying phrase would apply.[36] Finally, the Court held that the legislative history of the Act implied that the General Assembly intended to make the possession and use of weapons that could fire a projectile illegal, and the subsequent history showed no intent to broaden this initial thrust.[37]

However, although the state's LAR argument could not "alone carry the day" the Court did find that the statute, § 11-47-2(3), was ambiguous as it presented two reasonable interpretations.[38] Since the statute in question, the Firearms Act, is penal in nature, the rule of lenity compels the Court to resolve any ambiguity in favor of the party facing punishment under its application.[39] If, as the state contended, the General Assembly had intended the Act to include weapons which could not expel a projectile then "it

34. *Id.* at 487. The modifying clause "from which steel or metal projectiles are propelled, or which may readily be converted to expel a projectile" is found at the end of a single "integrated list" of instruments, and as the modifier applies to at least one of the antecedents, it is "more plausible" "that it in fact applies to all" of the instruments and not only the last antecedent, "other instrument." *Id.* *See also* United States v. Bass, 404 U.S. 336, 337 (1971) (holding that the qualifying phrase "in commerce or affecting commerce" would apply to all the antecedent terms "receives, possesses, or transports," not only the last antecedent). The Court here relied upon this reasoning. *Id.* at 487.

35. *Id.* at 489.

36. *Id.* The court compared the present case with State v. Brown, 486 A.2d 595 (R.I. 1985): there, where the Court applied the LAR, the General Assembly had included the term "or" twice to create two categories of offenses that constituted racketeering activity making the invocation of the LAR "perfectly consistent with the thrust of the statutory language." *Hazard*, 68 A.3d at 489 (citing *Brown*, 486 A.2d at 600).

37. *Hazard*, 68 A. 3d at 491. Looking back at the amendments that have been made to the Act, the Court commented that "there is nothing . . . that suggests [an] inten[t] to extend the . . . prohibitions to instruments that can neither fire a bullet nor be readily converted to do so." *Id.*

38. *Id.* at 491–492.

39. *Id.* at 492 (citing State v. Clark, 974 A.2d 558, 571 (R.I. 2009)).

was incumbent upon [them] to express that intent clearly and unambiguously."[40] Here, because the General Assembly had not done so and the rule of lenity required the Court to interpret the statute in favor of a criminal defendant, non-firing weapons had to be excluded.[41]

Beyond the LAR argument, the state advanced two ancillary arguments in support of its position. First, that the interpretation by the trial justice, as it relates to pistols, created a prerequisite that the Legislature had deliberately avoided, and second, that the last sentence of § 11-47-2(3) was inconsistent with the trial justice's interpretation of the first sentence.[42]

As to the first argument, the definition the state relied on in § 11-47-2(8) was silent on the issue of whether a "pistol" need be able to fire a projectile.[43] In light of this, the Court reasoned that the definition found in § 11-47-2(8) was meant to supplement, rather than supplant, the definition found in § 11-47-2(3).[44] The Court was in "full agreement with the trial justice" in determining that that "any pistol that cannot expel a projectile or is not readily able to be converted to expel a projectile is not covered under the statute."[45]

Secondly, the state contended that the second sentence of § 11-47-2(3), which provides that "[t]he frame or receiver of the weapon shall be construed as a firearm," does not conform with the trial justice's requirement that a pistol must be "operable or be readily converted to operability."[46] However, the Court viewed the idea of allowing the second sentence to control the

40. *Id.*

41. *Id.*

42. *Id.* at 492–93. The last sentence reads that a "frame or receiver of the weapon shall be construed as a firearm under the provisions of this section." R.I. GEN. LAWS § 11-47-2(3).

43. *Id.*

44. *Hazard,* 68. A.3d at 493.

45. *Id.* at 493–94. This interpretation was in line with the Court's jurisprudence found in State v. Benevides; there, a pistol that was discarded was found to have broken upon being ejected from a vehicle and there the state needed to prove the operability of the pistol prior to its ejection as an essential element. 425 A.2d 77, 79–80 (R.I. 1981). Since the state had to prove operability there, it must be required under § 11-47-2(3). *Hazard*, 68 A.3d at 495.

46. *Id.* at 495.

interpretation of the first as a "backwards approach."[47]

The Court addressed one final aspect of the trial justice's interpretation requiring that under § 11-47-2(3) "a frame or receiver of a weapon must either be capable of expelling a projectile or be readily convertible to do so in order to qualify as a 'firearm.'"[48] The state asserted that the language was "clear and unambiguous" with relation to whether a frame or receiver will be a weapon.[49] Ultimately, the Court did not agree with the state's proposed interpretation, looking to the fact that the limited text the state presented from the Act does not define "the weapon."[50] The Court reasoned that the term "weapon" was defined by the first sentence of § 11-47-2(3).[51] Therefore, the trial justice was correct in determining "that the frame or receiver must either be able to expel a projectile or be readily convertible to do so in order to qualify as a firearm."[52]

B. *Defendant's Probation Violation*

Defendant asked the Court to vacate the trial justice's determination that he had violated the conditions of his probation and remand the matter with instructions for a lesser sentence.[53] To do this the Court would have to overturn both findings that the possession of a firearm was a violation of Defendant's probation and that the eluding charge was sufficient to violate the terms and conditions of Defendant's probation.[54]

With respect to the Firearms Act violation, the Defendant contended that the pistol in question qualified as an "antique

47. *Id.* The lack of the operability clause in the second sentence does not apply to the items listed in the first. *Id.*

48. *Id.* at 496.

49. *Id.*

50. *Id.* at 496. "The frame or receiver of the weapon shall be construed as a firearm under the provisions of this section." R.I. GEN. LAWS § 11-47-2(3).

51. *Hazard*, 68 A.3d at 498.

52. *Id.* The Court relied upon the federal case of United States v. Wonschik, which was also interpreting a firearms statute to read that the frame or receiver must fall within the aforementioned definition. See 353 F.3d 1192, 1196 (10th Cir. 2004); *Hazard*, 68 A.3d at 498.

53. *Hazard*, 68 A.3d at 499.

54. *Id.* at 499, 501.

firearm" as defined in § 11-47-25.[55] However, although both sides stipulate that the pistol is an "antique firearm" as defined by 18 U.S.C § 921, which the General Assembly incorporated in § 11-47-2(1), the Act also required that to be exempt the antique firearm must be "unsuitable for use."[56] Here, the testimony of multiple parties at trial supported the notion that the revolver could, without difficulty, be made suitable for use.[57] Thus, the revolver was a suitable "firearm" and "pistol" under the Act, supporting the trial justice's determination that the revolver was removed from the antique firearms exemption.[58]

As the firearm was outlawed by the Act, the trial justice found that Defendant had been the one in possession of the revolver.[59] The determination that Washington was lying when he claimed possession of the revolver was supported by his previous statement to a detective following his arrest.[60] Accordingly, there was substantial evidence to uphold Defendant's probation violation, and the Court affirmed both the trial justice's determination that the revolver was not exempted by the Act and that it was in Defendant's possession at the time of his arrest.[61] Laslty, as a trial justice has wide discretion in sentencing, the Court found that the justice here was within his purview in sentencing Defendant to ten (10) years.[62]

Justices Flaherty and Indeglia filed an opinion both concurring in part and dissenting in part.[63] In the opinion, they concur with the majority's opinion on the probation issue, but they dissent from the Court's stance on the interpretation issue.[64] They believed that the statute was unambiguous and presented policy arguments suggesting that not all the instruments

55. *Id.* at 499. If a firearm qualifies as an "antique firearm" under the Act then it is exempt from its regulations. *Id.* at 500.

56. *Id.* at 500.

57. *Id.*

58. *Id.*

59. *Id.* at 500–01.

60. *Id.*

61. *Id.* at 501 (reviewing the trial justice's determination under an "arbitrary or capricious" standard). The Court also affirmed the trial justice's finding that Defendant had eluded police intentionally and that this alone was a violation of Defendant's probation. *Id.*

62. *Id.* (citing State v. Roberts, 59 A.3d 693, 697 (R.I. 2013)).

63. *Id.* at 501 (Flaherty, J. & Indeglia J., dissenting).

64. *Id.* at 502–04 (Flaherty, J. & Indeglia J., dissenting).

enumerated in that Act need to be able, or readily convertible, to expel a projectile to fall within the legislative intent.[65]

COMMENTARY

The Court made a reasonable interpretation of the relevant language within the Firearms Act while properly upholding Defendant's probation violation and subsequent sentencing. With respect to the Act, the Court found a well-based rationale both in the legislative history and by looking to the statutory scheme as a whole to uphold Superior Court Associate Justice Krause's diligent interpretations. Moreover, the Court put little credence in Defendant's argument for vacating the results of his probation violation. In fact, Defendant himself seemed unsure of his position, arguing different theories in his papers and at oral arguments.[66]

In the dissenting opinion, Justices Flaherty and Indeglia made a compelling argument for a contrary finding on the interpretation issue of whether a firearm needs to be operable or readily convertible to do so.[67] Perhaps the most compelling of the arguments advanced by the dissent was the idea that, as it relates to felons, the Act was not meant to include that the "firearm" be operable since there is a significant policy concern in keeping dangerous weapons out of the hands of felons.[68]

The dissent illustrates this disparity with an example of a bank robbery in which a blank gun is used.[69] One cannot rationally expect the victim to discern whether the gun can is capable of shooting bullets or merely a blank gun. Also, the possibility for the use of deadly force is still quite high as responding police officers or the victim could mistake an inoperable weapon for a functioning one and respond accordingly.[70]

65. *Id.* (Flaherty, J. & Indeglia J., dissenting).
66. *See id.* at 499.
67. *Id.* at 501–04 (Flaherty, J. & Indeglia J., dissenting).
68. *Id.* at 503 (Flaherty, J. & Indeglia J., dissenting).
69. *Id.* (Flaherty, J. & Indeglia J., dissenting).
70. *Id.* (Flaherty, J. & Indeglia J., dissenting).

CONCLUSION

The Rhode Island Supreme Court affirmed both the trial justice's interpretations of the Firearms Act as well as his conclusion that Defendant had violated the terms of his probation, resulting in a ten year sentence.[71]

Wm. Maxwell Daley

71. *Id.* at 501.

Criminal Law. *State v. Moten*, 64 A.3d 1232 (R.I. 2013). A defendant who wishes to appeal an evidentiary ruling must have raised and articulated the issue at trial through more than a general objection in order to preserve that issue for appellate review; if the defendant fails to raise the issue at trial, then that issue is waived. However, a narrow exception exists regarding the "raise or waive" rule, which allows the error as long as the error is more than harmless and originates from a novel rule of law that counsel could not have reasonably known about during trial. The novel rule of law requirement is narrowly construed and may arise from a single case The application of the novel rule does not need to be cemented at the time; it is enough that the novel rule was established in a single case.

FACTS AND TRAVEL

Nashya Moten ("Nashya"), the child of Amie Costa ("Ms. Costa") and Defendant Jeffrey Moten ("Moten"), was almost five months old when the events of November 23, 2005 occurred.[1] Ms. Costa, Moten, and Nashya lived in an apartment in Providence with three dogs.[2] That morning, Ms. Costa left Nashya at the apartment with Moten and went to work.[3] When Ms. Costa returned to the apartment after work around 3:30 that afternoon, Nashya made "weird scream/cry" sounds and when Ms. Costa picked her up, Nashya's "eyes were stuck in the [upper right] corner of her head not moving, not following any verbal sounds."[4] Ms. Costa called her pediatrician who recommended that Ms. Costa immediately take Nashya to the hospital.[5]

On November 23, Dr. Nancy Harper ("Dr. Harper") was on call at the hospital when a resident telephoned her because the resident was "very worried" about Nashya who was currently experiencing "seizures and a headache" and her "eyes were straight upwards and not moving."[6] Dr. Harper became "quite concerned" when she examined Nashya's CAT scan and observed

1. State v. Moten, 64 A.3d 1232, 1235 (R.I. 2013).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Dr. Harper is a board-certified pediatrician and a fellow in the Child Protection Program at R.I. Hospital; Dr. Harper also testified at trial as both a fact and expert witness in the field of child pediatrics and child abuse pediatrics. *Id.* at 1235–36.

"too much fluid around the brain, which is concerning for subdural hemorrhages."[7] Dr. Harper consulted with other physicians throughout her treatment of Nashya, including an ophthalmologist who was on duty that night and performed a "dilated eye exam" on Nashya which found that Nashya had "extensive retinal hemorrhages that covered the entire back of the eye" which could cause blindness.[8] Later that night, Dr. Harper, a mandatory reporter of child abuse and neglect, contacted the Department of Children, Youth and Families to report the incident.[9] Moten was charged with felony child abuse.[10]

Moten gave a statement to police later that night at 12:40 a.m.[11] He stated that he and Nashya took a nap together later that afternoon and when he woke up he used the bathroom, leaving Nashya in the bed.[12] While in the bathroom, he stated that he heard the dogs moving around and then heard Nashya fall out of the bed and scream.[13] Moten told police that Nashya did not bleed nor did she have any marks or bruises.[14] When Ms. Costa came home from work, Moten told her "that the dogs did it."[15]

At trial, Dr. Harper testified as a fact witness and also as an expert witness. During Dr. Harper's testimony concerning the ophthalmologist's report to her, defense counsel objected, which the trial judge immediately sustained.[16] The prosecutor then continued his questioning of Dr. Harper:

"Q: In other cases, you've reviewed eye exams with

7. *Id.* at 1236–37.
8. *Id.* at 1237.
9. *Id.* at 1236.
10. *Id.* at 1234 (citing R.I. GEN. LAWS 1956 § 11-9-5.3(b)(1)–(c)(4) which defines child abuse as "a person having care of a child . . . knowingly or intentionally . . . inflicts upon [that] child serious bodily injury"). Serious bodily injury is further defined as "physical injury that . . . [e]vidences subdural hematoma, intercranial hemorrhage and/or retinal hemorrhages as signs of 'shaken baby syndrome' and/or 'abusive head trauma.'" *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. Specifically, Dr. Harper described the exam the ophthalmologist performed on Nashya and stated "[h]e completed the evaluation and came and talked with me and reported to me that [Nashya] had . . ." when defense counsel objected. *Id.* at 1236.

ophthalmologists, correct?

"A: That is correct.

"Q: And do you need this information for a complete assessment of Nashya?

"A: Yes

"Q: And did you need it to further your information for the treatment of Nashya, as well as the diagnosis?

"A: Yes.

"Q: And what did he tell you.

"DEFENDANT'S ATTORNEY: Objection

"THE COURT: Overruled. You may answer"[17]

Dr. Harper then testified about details of Nashya's condition as being "consistent with abusive head trauma" and that there was "no medical, organic or other [reason] for her injuries other than inflicted injury."[18]

On December 5, 2006, the jury found Moten guilty of first degree child abuse.[19] Moten's motion for a new trial was denied, and on May 10, 2007, he was sentenced to twenty years, eighteen to serve and two years suspended with probation, plus one hundred hours of community service.[20] Moten appealed, claiming that the State violated his constitutional right of confrontation when Dr. Harper testified about the ophthalmologist's report to her.[21] Moten claimed this testimony was testimonial evidence, and therefore, Dr. Harper should not have been allowed to testify about the ophthalmologist's report because Moten did not have an opportunity to cross-examine the ophthalmologist.[22]

17. *Id.* at 1236–37.
18. *Id.* at 1237.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 1237–38. The Sixth Amendment to the U.S. Constitution and Article 1, Section 10 of the R.I. Constitution "guarantee individuals accused of criminal charges the right to confront and cross-examine any adverse witness who testify against them." *Id.* (citation omitted).

ANALYSIS AND HOLDING

The Supreme Court reviewed Moten's appeal *de novo* because of its evidentiary nature and applied its "long adhered to" rule of "raise or waive," denoting that "an issue that has not been raised and articulated previously at trial is not properly preserved for appellate review."[23] In order to be a properly raised evidentiary appeal, "a general objection is not sufficient . . . assignments of error must be set forth *with sufficient particularity* to call the trial justice's attention to the basis of the objection."[24]

Moten's sole issue raised on appeal was that he was denied his constitutional right of confrontation.[25] Moten argued that when defense counsel objected the second time during trial, that objection was based on Moten's "inability to confront [Dr. Harper]."[26] The Court, however, did not find this argument persuasive because defense counsel merely offered a general objection and based on the "raise or waive" rule, "an objection without explanation is insufficient to preserve an issue on appeal."[27]

Nevertheless, the Court noted that it has established a "narrow exception" to the "raise or waive" rule. First, for the exception to apply "the alleged error must be more than harmless, and the exception must implicate an issue of constitutional dimension derived from a novel rule of law that could not reasonably have been known to counsel at the time of trial."[28] Moten argued that the novel rule of law in contention here was the decision of the Supreme Court of the United States in *Crawford v. Washington* which established a new approach to Confrontation Clause challenges stating that "[w]here testimonial evidence is at issue, the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination."[29] Here, the Court found that *Crawford* could not be a novel rule of law applied to Moten's case because *Crawford* was decided more

23. *Id.* at 1238.
24. *Id.* (quoting Union Station Associates v. Rossie, 862 A.2d 185, 192 (R.I. 2004)).
25. *Id.* at 1238.
26. *Id.* at 1239.
27. *Id.*
28. *Id.* at 1240 (quoting State v. Breen, 767 A.2d 50, 57 (R.I. 2001)).
29. *Id.* at 1240–41 (quoting Crawford v. Washington, 541 U.S. 36, 124 (2004)).

than two-and-a-half years before Moten's trial.[30]

Nonetheless, Moten argued that *Crawford* was not the novel rule of law, but that two cases decided after *Crawford* were "intervening decisions of the Supreme Court of the United States [that] established a novel constitutional doctrine."[31] *Melendez-Diaz v. Massachusetts* held that affidavits from analysts at a state laboratory relating to a defendant's drug charge were "testimonial evidence" under *Crawford*; *Bullcoming v. New Mexico* held that the admittance into evidence of a certified blood alcohol concentration report through the testimony by a scientist who had not conducted the actual analysis of the defendant's blood alcohol concentration was testimonial evidence.[32] Moten argued that both subsequent cases expanded the rule announced in *Crawford* by defining lab reports as "testimonial evidence."[33] However, the Court disagreed with Moten's argument and found that *Melendez-Diaz* and *Bullcoming* simply applied the rule established in *Crawford*, and therefore, did not constitute a novel rule of law.[34] The Court further noted that Moten's argument confused a novel constitutional rule of law with a recognized rule of law applied to a novel fact pattern.[35] Moten argued in his brief that "an objective witness [would] reasonably believe that the resident's statements would be available for use at a later trial," and that these statements were recognized as testimonial evidence subject to the Confrontation Clause test as established in *Melendez-Diaz* and *Bullcoming*.[36] However, the Court dismissed this argument because that exact contention was formulated in *Crawford*, and therefore, *Melendez-Diaz* and *Bullcoming* simply applied the rule already recognized in *Crawford*.[37]

Justice Flaherty and Justice Indeglia dissented in part and concurred in part.[38] The Justices concurred in the final holding majority: that Dr. Harper's testimony did not violate the

30. *Id.* at 1241.
31. *Id.* (referring to Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) and Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011)).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* at 1242.
36. *Id.*
37. *Id.* (Flaherty, J., & Indeglia, J., dissenting).
38. *Id.* at 1243. (Flaherty, J., & Indeglia, J., dissenting).

Confrontation Clause.[39] However, the Justices disagreed with the analysis the majority employed; the Justices argued that *Crawford*, while it established a new rule of law, left much to be determined.[40] They further argued that the holding in *Crawford* was vague and did not establish "the precise contours of what is and what is not 'testimonial evidence.'"[41] Justice Flaherty reasoned that the full application of *Crawford* was not known until after it had been applied in the subsequent cases of *Melendez-Diaz* and *Bullcoming*.[42] Therefore, Morten could not have reasonably known at trial the full extent of *Crawford*'s application to his case.[43] Accordingly, the Justices argued that this evidentiary issue "employed novel applications to an unsettled rule of law" and suggested the majority should have applied the primary purpose test to Morten's case to determine if the statements the ophthalmologist made to Dr. Harper were testimonial.[44] In their analysis of the ophthalmologist's report, the Justices found that the primary purpose of the report was to "resolve an ongoing medical emergency—to wit, damage to the baby's eye sight and the potential threat of blindness."[45] The dissenting justices ultimately found the ophthalmologist's report was not testimonial, and Dr. Harper's testimony concerning the report did not violate the Confrontation Clause.[46]

COMMENTARY

In holding that *Moten* did not fall within the parameters of the narrow exception of novel rule of law to the "raise or waive" rule, the Court construed the exception even more narrowly.[47] The Court's interpretation of "novel" is extremely restrictive. The result of the Court's interpretation of "novel" will be a drastic limitation in the number of cases that are preserved for appeal through the novel rule of law exception. The purpose behind the novel rule exception to the "raise or waive" rule is fairness. Here,

39. *Id.* (Flaherty, J., & Indeglia, J., concurring).
40. *Id.* at 1244. (Flaherty, J., & Indeglia, J., dissenting).
41. *Id.* (Flaherty, J., & Indeglia, J., dissenting).
42. *Id.* (Flaherty, J., & Indeglia, J., dissenting).
43. *Id.* at 1245. (Flaherty, J., & Indeglia, J., dissenting).
44. *Id.* at 1245–46. (Flaherty, J., & Indeglia, J., dissenting).
45. *Id.* at 1248. (Flaherty, J., & Indeglia, J., dissenting).
46. *Id.* (Flaherty, J., & Indeglia, J., dissenting).
47. *Id* at 1240.

the effect of the Court's opinion puts fairness aside in favor of efficiency.

An attorney now has to have the foresight to predict the application of the novel rule of law to his current set of facts. In so doing, the Court has drastically narrowed an attorney's ability to appeal and thus, has infringed on the fairness that the "raise or waive" rule purports to embody. Apparently, now, a lawyer has to anticipate the application of a novel constitutional rule to his specific case before the rule is actually applied in a subsequent case in order to preserve the issue for appeal. Yes, *Crawford* was announced two years before Moten's case came to trial, but both *Melendez-Diaz* and *Bullcoming* were important and decisive United States Supreme Court jurisprudence that clarified the meaning of "testimonial evidence."[48] These two cases not only clarified the rule announced in *Crawford* but expanded the rule to include certified forensic and analyst reports with the requirement that the person testifying to the reports was the person who also conducted the tests. This definition of "testimonial evidence" was not established law at the time of Moten's trial, and therefore, would have been a novel rule of law.

The dissenting justices pointed out that, at the time of Moten's trial, the rule set forth in *Crawford* was "unsettled" and that such an unsettled rule of law is synonymous with a novel rule of law.[49] The purpose of the novel rule exception to "raise or waive" is that an attorney cannot possibly be held to make a particularized objection at trial to a rule that was not known at the time of trial. The Court's decision in *Moten* confines the idea of "novel" to a completely undeveloped area of law, thereby effectively nullifying the "novel rule of law" appeal preservation.

CONCLUSION

The Rhode Island Supreme Court held that an issue or objection raised at trial must be articulated and more than a mere general objection is required in order to preserve that issue or objection for appeal.[50] A party who fails to particularize an

48. *Id* at 1244 (Flaherty, J. & Indeglia, J., dissenting).
49. *Id.* at 1245 (Flaherty, J. & Indeglia, J., dissenting).
50. *Id* at 1238.

objection at trial is deemed to have waived that issue.[51] Also, the Court held that the narrow exception to "raise or waive" rule states the error must be more than harmless and derive from a novel rule of law that counsel could not have reasonably known at trial.[52] The Court further held the exception does not apply when the defendant is merely applying a novel fact to an established rule of law.[53]

Melissa Wood

51. *Id.*
52. *Id* at 1240.
53. *Id.*

Criminal Law. *State v. Poulin*, 66 A.3d 419 (R.I. 2013). The Rhode Island Supreme Court addressed whether pleading *nolo contendere* to a felony charge and then, afterward, successfully completing a term of probation was a "conviction" for the purposes of the sealing statutes, specifically R.I. Gen. Laws §12-1-12 and §12-1-12.1. The Court held that pleading *nolo contendere* to a felony charge followed by a successfully completed term of probation did not constitute a "conviction" for the purposes of sealing records regarding subsequent dismissed misdemeanor complaints.

FACTS AND TRAVEL

In January of 1996, Doris E. Poulin ("defendant") pleaded *nolo contendere* to one felony count of possession of a controlled substance.[1] In exchange for her plea, defendant was placed on a two year probation and was required to fulfill specific conditions, all of which she undisputedly complied with.[2] Defendant was subsequently charged with a misdemeanor offense, which was dismissed in July of 1996.[3] Years later, in December of 2009, defendant was arrested and charged with an additional misdemeanor offense, which was dismissed in February of 2010.[4] In accordance with R.I. Gen. Laws §12-1-12.1, defendant moved to have the records related to her two misdemeanor offenses sealed, as well as the law-enforcement records relating to these offenses destroyed.[5] The Sixth Division District Court denied defendant's sealing motions and concluded that "the prior drug offense for which defendant was placed on probation was, for the purposes of §12-1-12.1, a conviction"; therefore, defendant was barred from having her two misdemeanor offenses expunged from her record.[6]

1. State v. Poulin, 66 A.3d 419, 421 (R.I. 2013).

2. *Id.* Along with defendant's two-year probation, the plea bargain conditions required defendant to complete a substance abuse program and to perform 100 hours of community service. *Id.*

3. *Id*. Defendant was charged with the misdemeanor offense of operating a motor vehicle on a suspended license. *Id.*

4. *Id.* Defendant was charged with the misdemeanor offense of driving under the influence. *Id.*

5. *Id.* at 421–22; *see* R.I. GEN. LAWS §12-1-12.1(a) (2002) (providing that "[a]ny person who is acquitted or otherwise exonerated of all counts in a criminal case, including, but not limited to, dismissal or filing of a no true bill or no information, may file a motion for the sealing of his or her court records in the case, provided, that no person who has been convicted of a felony shall have his or her court records sealed pursuant to this section").

6. *Poulin*, 66 A.3d at 422; *see* R.I. GEN. LAWS §12-1-12.1(a) (2002). "The

In April of 2013, defendant filed a petition for certiorari to the Rhode Island Supreme Court against the State of Rhode Island ("State").[7] The defendant sought review of a decision from the District Court, which denied her motions to seal records relating to two dismissed misdemeanor offenses.[8]

The Rhode Island Supreme Court granted the defendant's petition for certiorari in order to decide "whether a plea of *nolo contendere* to a felony charge followed by a successfully completed term of probation constituted a conviction for the purposes of the sealing statutes," specifically §12-1-12 and §12-1-12.1.[9] The defendant advanced several arguments in support of her contentions.[10] The defendant argued "that the plain and unambiguous language of the relevant statutes" dictated her entitlement to have the court files from her dismissed misdemeanor offenses sealed and all the records relating to those offenses destroyed.[11] The defendant also argued that because the sealing and expungement statutes are "separate and distinct in both purpose and design" the court should treat each statute unrelated to the other.[12] Additionally, the defendant asserted that the sealing statute does not conflict with the recording statutem because the recording statute, alone, imposes a duty of record keeping on the Attorney General.[13] Comparatively, the State argued that pleading *nolo contendere* to a felony charge followed by probation "constitutes a felony conviction" and, thus, bars a defendant from receiving any benefits of the sealing statute.[14] In support of its argument, the State asserted that "the

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trial judge explained that it would not be logical for the definition of 'conviction' to differ as between the sealing and expungement statutes," especially when the two statutes were "somewhat intertwined." *Poulin*, 66 A.3d at 422 (internal quotation marks omitted).

7. *Id.* at 421.

8. *Id.*

9. *Poulin*, 66 A.3d at 422; *see also* R.I. GEN. LAWS §12-18-3(a) (2002) (providing that "[w]henever any person shall be arraigned before the district court or superior court and shall plead *nolo contendere*, and the court places the person on probation pursuant to §12-18-1, then upon the completion of the probationary period, and absent a violation of the terms of the probation, the plea and probation shall not constitute a conviction for any purpose").

10. *Poulin*, 66 A.3d at 422.

11. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

plain wording and statutory structure of chapter 1 of title 12" led to its conclusion, which also was supported by the Rhode Island Supreme Court's precedent regarding the meaning of conviction.[15]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court's review of a case granted on "certiorari is limited to an examination of 'the record to determine if an error of law has been committed.'"[16] In examining a record for judicial error, the Court reviews the entire record in order to determine if there is legally competent evidence to support the justice's findings.[17] The Court "reviews questions of statutory construction and interpretation *de novo*."[18] In addition, the Court interprets statutes "literally and gives the words their plain and ordinary meanings," especially when such statutes contain clear, unambiguous language.[19]

The Court pointed out that, although at their most basic level sealing and expungement statutes relate to the destruction or elimination of certain criminal records and/or convictions, the actual provisions of the two statutory schemes differ in obvious ways.[20] The Court noted that sealing motions, under §12-1-12 and §12-1-12.1, are made "with respect to an acquittal and in cases that have been dismissed in circumstances amounting to an exoneration," while expungement motions relate to criminal dispositions and are available only to first offenders.[21] Furthermore, "[b]y enacting separate and distinct statutory

15. *Id.* at 422–23. Specifically, the State argued that chapter 1 of title 12 leads to the conclusion that a plea of *nolo contendere* followed by a probation does in fact constitute a conviction for the purposes of the sealing statute. *Id.*

16. *Id.* at 423 (quoting State v. Greenberg, 951 A.2d 481, 489 (R.I. 2008)).

17. *See id.;* Brown v. State, 841 A.2d 1116, 1121 (R.I. 2004) (quoting Ryan v. Roman Catholic Bishop of Providence, 787 A.2d 1191, 1193 (R.I. 2002)).

18. *Poulin*, 66 A.3d at 423.

19. *Id. See also* State v. Briggs, 58 A.3d 164, 168 (R.I. 2013) (clarifying that the Court must consider the entire statute as a whole and that, furthermore, individual sections are considered in the content of the entire statutory scheme); Curtis v. State, 996 A.2d 601, 604 (R.I. 2010) (noting that "it is generally presumed that the General Assembly 'intended every word of a statute to have a useful purpose and to have some force and effect'").

20. *Poulin*, 66 A.3d at 423–24.

21. *Id.* at 424; *see* R.I. GEN. LAWS §12-1-12, 12.1(a)(2002).

provisions, the Legislature plainly elected to treat these cases differently."[22]

Correspondingly, §12-18-3(a) states that when an individual pleads *nolo contendere* to a felony charge and, in return, receives probation, "the plea and probation shall not constitute a conviction for any purpose."[23] In essence, the statute forbids the State from preventing the sealing of records in a dismissed misdemeanor offense case.[24] Furthermore, nothing in §12-1-12 or §12-1-12.1 states that a plea of *nolo contendere* followed by probation should be deemed a conviction.[25] Moreover, "a plea of *nolo contendere* followed by probation does not preclude a defendant from sealing his or her records."[26] In addition, the Court summarized the underlying policy by stating that, "in the sealing context, the affected person has been acquitted or exonerated, whereas a person seeking to have his or her records expunged has not. Thus, sealing should be more widely available to those individuals than to those seeking to have their records expunged."[27]

Here, the defendant entered a plea of *nolo contendere* and successfully complied with the conditions of her probation sentence.[28] Accordingly, the Court found that this plea did not constitute a conviction for the purpose of the sealing statute.[29]

COMMENTARY

This case presents an example of how the interpretation of statutes can vary greatly amongst individuals. The Court reached a fair decision regarding the intent of the legislature in creating and enacting separate and distinct statutes, one for expungements and another for sealings. The Court reasoned that the intent of the legislature in creating and enacting separate and distinct statutes was to treat such statutes, and the coinciding cases that they will concern, differently. The Court recognized that each statute provides its own set of individual rules, regulations, and qualifications, and, if they were to be interpreted similarly, such

22. *Id.*
23. *Id.* at 425 (quoting R.I. GEN. LAWS §12-18-3(a) (2002)).
24. *Poulin*, 66 A.3d at 425.
25. *Id.*; *see* R.I. GEN. LAWS §12-1-12, 12.1(a) (2002).
26. *Poulin*, 66 A.3d at 425.
27. *Id.*
28. *Id.* at 426.
29. *Id.* at 425.

interpretation would eliminate the purpose of having two distinct statutes. Furthermore, the Court indicated that, although at a fundamental level the two statutes may be confused with one another, by examining the two statutes in-depth, the difference between the two becomes both evident and significant.[30]

Finally, the Court clarified the proper meaning of conviction within the statutes at issue. In clarifying the meaning of conviction, the Court provided the necessary guidelines in order for a defendant to obtain relief under each statute when sought. Now, under the rationale of the Supreme Court, if an individual pleads *nolo contendere* to a felony charge, followed by a successfully completed term of probation, such actions do not constitute a conviction for the purposes of the sealing statute, and, furthermore, that individual may still get the records pertaining to his or her dismissed misdemeanor offenses sealed.

CONCLUSION

The Court concluded that defendant had not been convicted of a felony for purposes of the sealing statutes, met all of the statutory requirements of the statutes, and, therefore, was entitled to the benefits provided for in those enactments.[31] Accordingly, the Court found that it was an error "to deny the defendant's motion to seal all records pertaining to her two dismissed misdemeanor arrests."[32] The Court concluded that the judgment of the District Court was overruled by asserting that it be "quashed."[33]

Alexsa Marino

30. *Id*. at 424 (clarifying that "a motion to seal is made with respect to an acquittal and in cases that have been dismissed, while a motion for expungement relates to a criminal disposition").

31. *Id.* at 425–26.

32. *Id.* at 426.

33. *Id.*

Criminal Law. *State v. Santos*, 62 A.3d 314 (R.I. 2013). A police officer possessing specific and articulable facts that justify a reasonable belief that a suspect is armed and dangerous is justified in conducting a pat-down frisk. Similarly, where a police officer has a reasonable belief based on specific and articulable facts that a non-arrested suspect is dangerous and may gain immediate control of a weapon from a vehicle, the officer may conduct a limited search of the vehicle for weapons under the protective-search doctrine. An investigatory detention, distinct from an arrest, may involve handcuffing and placing a suspect in the back of a police cruiser, should such an intrusion be reasonable under all of the facts and not a ruse to justify a search.

FACTS AND TRAVEL

On April 24, 2010, Officer Bethany Dolock of the South Kingstown Police Department pulled over defendant-appellant Gary Santos, who was traveling about twenty miles per hour over the speed limit.[1] Upon approaching the vehicle, Officer Dolock noticed "several loose bullets in an ashtray to the left-hand side of the steering wheel."[2] She "called for backup from the South Kingstown Police Department on a radio on her lapel when she first observed the bullets . . . "[3] Officer Dolock then "asked the driver if he had a weapon; he responded that he did not."[4] She reported that she then "detected a strong odor of alcohol emanating from the vehicle" and observed "that the driver was looking around the car and intentionally looking away from her."[5] Officer Dolock again asked the driver if he had a weapon, which he answered in the negative.[6] Officer Dolock stated that the driver then turned towards the passenger side of the vehicle, and, as she could no longer see his hands, she feared for her own safety.[7] She partially drew her service weapon, directed the

1. State v. Santos, 62 A.3d 314, 317 (R.I. 2013).
2. *Id*.
3. *Id.* n.3.
4. *Id.* at 317.
5. *Id.*
6. *Id*.
7. *Id*.

driver to "put his hands where she could see them," and told him to get out of the vehicle.[8] Santos complied.[9] Upon Santos exiting the vehicle, Officer Dolock reported "a strong odor of alcohol coming from Santos' breath," and that Santos had "bloodshot, watery eyes and a slight sway in his stance."[10]

Officer Dolock conducted a cursory pat-down of Santos' outer clothing for a weapon and found a small pocket knife in one of his pockets.[11] Officer Dolock asked Santos whether there were any more weapons; he said there were not, though he appeared hesitant as he looked at his vehicle.[12] She placed Santos in handcuffs while explicitly informing him that he was not under arrest.[13] At that time, Trooper Marc Lidsky of the Rhode Island State Police passed by the scene and stopped to assist.[14] Santos did not answer Officer Dolock's further questions, saying that "he would only speak to the trooper because he was in charge."[15]

Two South Kingstown officers arrived as backup as Officer Dolock led Santos to her cruiser.[16] As soon as she secured Santos in the rear of her cruiser, Officer Dolock searched Santos' vehicle for weapons while Trooper Lidsky kept an eye on Santos.[17] Officer Dolock first searched the front passenger's side of the vehicle, where she observed several more loose bullets and what appeared to be the butt of a gun.[18] She tilted the passenger seat forward and discovered a loaded revolver on the floor.[19] Still in the cruiser, Santos did not respond to Officer Dolock's questioning about documentation for the revolver.[20] Santos was escorted out of her cruiser where he refused to submit to standard field sobriety tests.[21] Officer Dolock then arrested Santos for suspicion

8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *See id.* n.2.
13. *Id.* at 317.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

of driving under the influence of intoxicants; she again placed him back in her cruiser to transport him to the South Kingstown police station for processing.[22]

Santos was charged with carrying a weapon while under the influence of intoxicating liquor or narcotic drugs ("Count 1"); carrying a firearm in a motor vehicle without a license ("Count 2"); and unlawfully operating a motor vehicle while under the influence of intoxicating liquor ("Count 3").[23] The trial judge granted Santos' Rule 29 motion for a judgment of acquittal as to Count 1 and Count 3, but denied Santos' motions to suppress the revolver and bullets as "fruits of an illegal search" as to Count 2.[24] Following Santos' renewed motion to suppress, the trial justice determined that the search could not be justified as a "search incident to arrest," as "[Santos] was neither free nor mobile and was not within reaching distance of the passenger compartment of the vehicle."[25] The trial justice found, however, that "there was sufficient probable cause to search the vehicle for hidden weapons, given the time of night [(8:30 p.m.)], the discovery of bullets in plain view, the furtive movement by [Santos], and his purposeful failure to look directly at Officer Dolock." The trial justice further reasoned that, even if probable cause did not exist, the revolver would be "inevitably discovered during an inventory search."[26] On November 18, 2010, a jury entered a verdict of guilty on Count 2; Santos was sentenced to five years imprisonment, including one year to serve and the remainder suspended, with probation.[27] Santos appealed the denial of his motion to suppress.[28]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court initially identified four legal theories to determine whether Santos' motion to suppress the revolver should have been granted.[29] The theories examined, respectively, were whether the facts could justify a finding of (1)

22. *Id.* at 317–18.
23. *Id.* at 318.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 319.

reasonable suspicion under the protective-search doctrine, (2) probable cause under the "automobile exception," (3) inevitable discovery during an inventory search, and (4) search incident to arrest.[30] The state focused on the protective search rationale, and, alternatively, contended that the revolver would have been inevitably discovered as the result of a search incident to arrest.[31] The trial court's findings of facts are overturned only when clearly erroneous.[32] Alleged violations of a defendant's Constitutional rights are independently examined, while evidence in the record is viewed in the light most favorable to the state.[33]

As neither the defense nor the state "support[ed] the rationale of the trial justice, which was based on a finding of probable cause,"[34] the Court found that the trial justice "erred in stating that these facts had to rise to the level of establishing probable cause, when the protective-search doctrine only requires reasonable belief."[35] Declining to further examine the "automobile exception,"[36] the Court proceeded to analyze the protective search theory, under its "authority to affirm on grounds other than those relied on by a trial justice, and because a protective search is permitted under a standard that is less rigorous than probable cause."[37]

The Court found that Officer Dolock's pat-down was consistent with the Fourth Amendment, as she "was reasonable in her belief that Santos might be armed and dangerous."[38] The

30. *Id.*
31. *Id.*
32. *Id.* at 318–19.
33. *Id.* at 319.
34. *Id.*
35. *Id.* at 319–20.
36. *Id.* at 319. The Court stated "we do not express any opinion on the parties' arguments concerning inevitable discovery pursuant to an inventory search, search incident to arrest, or the automobile exception." *Id.* at 323 n.7.
37. *Id.* at 319 (citing State v. Quaweay, 799 A.2d 1016, 1018 (R.I.2002) as to the Court's authority to affirm on grounds other than those relied on by a trial justice).
38. *Id.* at 320 (citing State v. Aubin, 622 A.2d 444, 445 (R.I.1993); State v. Collodo, 661 A.2d 62, 64–65 (R.I. 1995)). The Court noted the circumstances which justified Officer Dolock's belief, including "observation of loose bullets—combined with Santos' furtive movements, intentional avoidance of eye contact, and positioning of his hands in such a way that the officer could not see them—as well as the fact that it was approximately 8:30 p.m., Officer Dolock was alone, . . . " *Id.*

exact circumstances and size of the small knife found through the pat-down were not discussed. The Court likewise noted that "an officer may conduct a limited search of an automobile for weapons when the police officer 'has an articulable suspicion to believe that the suspect may be armed and dangerous' and that the suspect has the 'present ability to obtain a weapon.'"[39] Given the circumstances previously mentioned, including the discovery of a small knife in Santos' pocket when he repeatedly stated that he did not have a weapon, the Court found that "Officer Dolock possessed specific and articulable facts that justified her decision . . . to conduct a limited sweep of Santos' vehicle for weapons."[40]

The Court next examined Santos' argument that "even if there was a reasonable belief that he was armed and dangerous, there could be no reasonable belief that he had a present ability to obtain a weapon because he was handcuffed and secured in Officer Dolock's cruiser."[41] The Court found that the "present ability to obtain a weapon" element of a protective search of a vehicle was satisfied under the rationale of *Michigan v. Long*.[42] The Court cited the United States Supreme Court in *Long*, which stated that "a suspect could break away from the officer and retrieve a weapon in the vehicle or may be permitted to re-enter the vehicle before the investigation is over and gain access to a weapon."[43] The Court applied this logic to Santos: "In addition to the danger that Santos might break away before the conclusion of the field sobriety tests, there was also a possibility that Santos would return to his vehicle and secure the revolver if Officer Dolock elected to release him after administering the tests to him."[44]

The defense presented two alternative arguments that the Court rejected.[45] First, Santos argued that being handcuffed and placed in the back of Officer Dolock's cruiser transformed the

39. *Id.* (citing State v. Milette, 727 A.2d 1236, 1239–40 (R.I.1999) and Michigan v. Long, 463 U.S. 1032, 1049 (1983)).

40. *Id.* at 321.

41. *Id.*

42. *Id.*

43. *Id.* (citing *Long*, 463 U.S. at 1047, 1051–52).

44. *Id.* (citing *Milette*, 727 A.2d at 1239 "when a police officer compels the exit of an individual from a vehicle in order to conduct a Terry frisk, the officer remains vulnerable to the possibility that the individual, if not arrested, will be free to retrieve any weapons within his car").

45. *Id.* at 322.

investigatory stop into a "*de facto* arrest, which required probable cause."[46] The Court stated that the applicable standard is "whether a detention is an investigative detention or an actual arrest depends on the reasonableness of the intrusion."[47] The Court found that Santos was secured to the extent reasonable under the circumstances and only long enough for Officer Dolock to conduct the search of Santos' vehicle.[48] Second, Santos argued that Officer Dolock's decision to conduct a *Terry* search, instead of placing him under arrest for driving under the influence, suggests improper manipulation of the circumstances to justify the search.[49] The Court also rejected this argument, finding that "Officer Dolock acted reasonably, and did not deliberately wait to arrest Santos."[50] Finally, the Court concluded that there was "sufficient evidence to prove beyond a reasonable doubt"[51] that Santos "knowingly possessed the revolver and intentionally exercised control over it."[52]

COMMENTARY

The Court correctly found that Officer Dolock had an "articulable suspicion to believe that the suspect may be armed and dangerous" for the purpose of a "brief pat-down."[53] The Court also correctly determined that Officer Dolock's handcuffing and placing of Santos in the back of her police cruiser was reasonable and did not transform the investigatory detention into a de facto arrest.[54] However, the Court may have improperly expanded upon the holdings of *Milette* and *Long*, contrary to the rationale of *Gant*, under the facts of the instant case.[55]

In *Gant*, the United States Supreme Court emphasized the importance of protecting individuals' Fourth Amendment rights

46. *Id.* (emphasis in original).
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 323.
51. *Id.* at 324.
52. *Id.* at 323.
53. *Id.* at 320.
54. *Id.* at 322.
55. *See* Arizona v. Gant, 556 U.S. 332, 342–47 (2009); *Milette*, 727 A.2d at 1239–40; *Long*, 463 U.S. at 1033.

during automobile searches.[56] The U.S. Supreme Court explicitly stated in *Gant* that the *Long* exception for protective searches "permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual [] is 'dangerous' and might access the vehicle to 'gain immediate control of weapons.'"[57] *Long's* protective searches are permitted in a narrow set of circumstances discussed in *Gant*; to expand protective searches beyond such narrow circumstances may infringe on Fourth Amendment protections of individual rights.[58] In discussing the dangers of police overreach in conducting searches incident to arrest, the majority in *Gant* approvingly quoted concerns for individual rights voiced in Justice Scalia's concurrence in *Gant*: "although it is improbable that an arrestee could gain access to weapons stored in his vehicle after he has been handcuffed and secured in the backseat of a patrol car, cases allowing a search in 'this precise factual scenario . . . are legion.'"[59]

In the instant case, Officer Dolock no longer had a reasonable suspicion that Santos "might access the vehicle to gain immediate control of weapons" once he was handcuffed, placed in the back of the cruiser, and three other officers arrived on the scene to help control the one suspect. At this time, a field sobriety test could have been conducted without the risk of Santos gaining access to a weapon stored in his vehicle. While the United States Supreme Court in *Long* reasoned that "if the suspect is not placed under arrest, he will be permitted to reenter his automobile, and he will then have access to any weapons inside," Officer Dolock stated that she had not yet decided whether to arrest Santos.[60] Officer Dolock ultimately arrested Santos after his refusal to submit to field sobriety tests for "suspicion of driving under the influence of

56. Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. *See Gant*, 556 U.S. at 351. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. *Id.*

57. *Gant*, 556 U.S. at 346–347.

58. *See id.* (citing *Long,* 463 U.S. 1032).

59. *Id.* at 342.

60. *See Long*, 463 U.S. at 1052; *Santos*, 62 A.3d at 317.

intoxicants."[61] Unlike a scenario in which Officer Dolock remained the lone officer, or had decided not to arrest Santos, a search of the vehicle was not apparently necessary for protection. Therefore, a better approach would have been for the Court to decline application of the protective search exception.

CONCLUSION

The Rhode Island Supreme Court held that an officer with a reasonable suspicion that a suspect is armed and dangerous, based on specific and articulable facts, may conduct a brief pat-down. The protective-search doctrine likewise justified a limited search of a vehicle for weapons where an officer had a reasonable suspicion justified by specific and articulable facts that a suspect was dangerous and may gain immediate control of a weapon from the vehicle. A suspect may be considered under "investigatory detention," as opposed to under arrest, if intrusions such as handcuffs and placement in the back of a police cruiser are reasonable under all of the facts and not a ruse to justify a search.

Jeremy Rix

61. *Santos*, 62 A.3d at 317.

Family Law. *Boyer v. Bedrosian*, 57 A.3d 259 (R.I. 2012). Participants in the Family Court's Truancy Court Diversion Calendar Program brought suit claiming that through the administration of the Truancy Court their constitutional rights were being violated. The Supreme Court of Rhode Island found that the recently issued Family Court Administrative Order 2010-2 coupled with current law rendered the plaintiffs' constitutional challenges moot. Further, the Court held the case was not subject to an exception of the mootness doctrine.

FACTS AND TRAVEL

In September of 1999, the chief judge of the Family Court founded the Truancy Court Program to allow "Family Court magistrates to conduct court sessions at schools with frequently truant children."[1] The Family Court intended the Truancy Program "to facilitate collaboration between the Family Court, schools, and service providers" in order to guarantee that parents and children were able to receive services efficiently and effectively in their own communities.[2]

In March of 2010, the fifteen students and their parents who participated in the Family Court's Truancy Court Diversion Calendar Program (collectively "the plaintiffs"), brought suit in Superior Court against the chief judge, five magistrates, and two administrators of the Family Court, as well as five municipalities and the public school districts for those five municipalities ("the defendants").[3] The plaintiffs alleged that all of the defendants were operating the Truancy Court in violation of the law.[4] The

1. Boyer v. Bedrosian, 57 A.3d at 259, 265 n.9 (R.I. 2012) (explaining "[a] determination of truancy qualifies a child as 'wayward.' R.I. GEN. LAWS 1956 § 14-1-3").

2. *Id.* at 260, 265.

3. *Id.* at 263–64. In the "initial complaint, Jeremiah S. Jeremiah was the Chief Judge of the Family Court. After Chief Judge Jeremiah retired, plaintiffs amended the complaint to substitute the then-acting and now presiding chief judge of the Family Court, Chief Judge [] Bedrosian." *Id.* at 260 n.1. For an additional, more detailed factual background regarding the particular events that lead to the plaintiffs' bringing suit, see Boyer v. Jeremiah, No. 2010-1858, 2010 WL 4041812 (R.I. Super. Ct. Oct. 8, 2010).

4. *See id.* at 266. The plaintiffs alleged that the operation and

plaintiffs' complaint alleged ten constitutional violations.[5] The plaintiffs brought the lawsuit as a proposed class action and civil rights lawsuit; they demanded declaratory and injunctive relief.[6]

Subsequently, in May of 2010, the defendants moved to dismiss the complaint and moved to strike three of the plaintiffs' claims.[7] The trial justice heard oral arguments on defendants' motions to dismiss and motion to strike.[8] Before the trial judge ruled on the motion, the Chief Judge of the Family Court, Judge Bedrosian, issued the Family Court Administrative Order 2010-2 ("the Order").[9] The Order laid out "written procedures that dramatically reformed the Truancy Court Diversion Calendar Program."[10] For example, the Order "mandated that 'all truancy petitions shall be referred to the RI Family Court Intake Department for a preliminary investigation,'" and if the department determined, following the preliminary investigation, that there was insufficient evidence to bring the student within the Truancy Court's jurisdiction, then the petition would not be

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administration of the Truancy Court violated "the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and article 1, section 2 of the Rhode Island Constitution, the Rhode Island General Laws, the Family Court Rules of Juvenile Proceedings, and the Supreme Court Rules of Judicial Conduct." *Id.*

5. *Id.* at 272. The plaintiffs alleged that the defendants:

> (1) did not provide sufficient notice of conduct that would result in a child's referral to Truancy Court; (2) deprived children of a preliminary investigation prior to the filing of the truancy petition; (3) failed to serve summonses and copies of truancy petitions; (4) failed to properly arraign children; (5) improperly permitted children to waive their constitutional rights; (6) deprived children of a right to counsel; (7) issued orders without personal jurisdiction; (8) did not transcribe or record the Truancy Court proceedings; (9) deprived children of a meaningful opportunity to be heard by not appointing interpreters; and (10) deprived children of a meaningful opportunity to be heard by engaging in *ex parte* communications with school officials.

Id.

6. *Id.* at 266 (seeking declaratory relief as provided for under § 9-30-1 and injunctive relief as provided for under Rule 65 of the Superior Court Rules of Civil Procedure).

7. *Id.* at 267.

8. *Id.* The administrative and judicial defendants filed separate motions to dismiss, but only the judicial defendants filed a motion to strike. *See id.*

9. *Id.*

10. *Id.*

authorized.[11] The Order "also added a threshold requirement that a student must '[have] . . . 10 days of absences and/or . . . [be] habitually late or absent from school' before the Intake Department could refer a case to the truancy calendar."[12] Despite the after-enacted order, the trial justice denied the defendants' motions to dismiss without prejudice.[13] The defendants filed petitions for writ of certiorari, which the Rhode Island Supreme Court granted on December 10, 2010.[14]

ANALYSIS AND HOLDING

On writ of certiorari, the Court analyzed whether the claims were justiciable; to be justiciable, a "court must have subject-matter jurisdiction over the issues raised in the complaint, plaintiffs must have standing, and the issues must not be moot."[15] Initially, the Court assumed that the Superior Court had subject-matter jurisdiction, that the plaintiffs had standing to sue when the initial complaint was filed, and that the defendants were not immune from suit.[16] The Court focused its analysis on whether the plaintiffs' claims were moot.[17] The Court noted that a plaintiff must retain a personal stake in the outcome of a case throughout the litigation or the controversy will become moot, and thus, the case will no longer be justiciable.[18] The Court also noted that "the passage of a new law or an amendment to an existing law may moot a case."[19] The Court focused on how the ten alleged constitutional violations pertained to the issue of mootness.[20]

11. *Id.*
12. *Id.*
13. *Id.* at 268.
14. *Id.* at 268–69.
15. *Id.* at 270.
16. *Id.* at 270–71 (citing in relevant part Mangual v. Rotger-Sabat, 317 F.3d 45, 58 (1st Cir. 2003) ("[S]tanding is based on the facts as they existed at the time the complaint was filed.")).
17. *See id.*
18. *Id.* at 271.
19. *Id.* at 272 (citing Midwest Media Property, L.L.C. v. Symmes Township, Ohio, 503 F.3d 456, 460 (6th Cir. 2007)).
20. *Infra* note 6; *id.* at 270.

A. *Mootness*

The Court found that the Order mooted the issue of notice because by setting a minimum number of ten truancies before a student could be brought before the Truancy Court, the Order put a person of average intelligence on notice about the number of absences that it would take to result in a referral to the truancy program.[21] Further, the Order detailed how and when a child and his or her parent would receive notice; it provided that "if the Intake Department determine[d] a petition is suitable for the Truancy calendar, then the petition 'w[ould] be assigned to the appropriate school location,' and 'written notice'" would be provided.[22] While "an intake investigation [was] not required as a step in an accusatory proceeding of delinquency or waywardness," the intake investigation serve[d] to protect the juvenile from "'arbitrary bureaucratic actions.'"[23] The Order provided for procedures to "safeguard children from arbitrary bureaucratic action" by mandating a preliminary investigation.[24] Thus, the Court found the Order mooted the issue of depriving the child of preliminary investigation.[25]

The Court also determined that the issue of a summons was

21. *See id.* at 273–74. "Vagueness challenges under the [D]ue [P]rocess [C]lause rest principally on lack of notice . . . [A] statute is unconstitutionally vague if it compels 'a person of average intelligence to guess and to resort to conjecture as to its meaning and/or as to its supposed mandated application." *See id.* at 272–73 (quoting Moreau v. Flanders, 15 A.3d 565, 582–83 (R.I. 2011) (internal quotation marks omitted)).

22. *Id.* at 273. The written notice:

> informs the parents that the child [was] referred to the Family Court on a wayward status offense of truancy[,] . . . that the child has been prescreened to enter the Truancy Diversion Program[,] . . . [and] [t]he notice explains that the parents will have the opportunity to provide valid excuses for absences . . . at the hearing. Finally, the notice briefly describes the Diversion Program and sets the location, time, and date of the initial meeting with a magistrate.

Id. (internal quotation marks omitted).

23. *Id.* at 274.

24. *See id.* The Order provides that "all truancy petitions shall be referred to the RI Family Court Intake Department for a preliminary investigation[,]" and the Order also clarifies how the Intake Department shall determine if sufficient evidence and documentation exists in order to bring the juvenile in the jurisdiction of the Family Court. *Id.* at 274.

25. *See* Administrative Order 2010-2 Intake Department-Duties § 8-10-22; *Bedrosian*, 57 A.3d at 274.

moot, as the Order directed that a child could "choose" to participate in the Truancy Program, and thus, the child's appearance would be voluntary, so a summons would not be required.[26] The Court noted the Order elaborated that if the child or parent did not appear at the Truancy calendar, then the Court could issue a summons; further, if the parent and child did not each agree to participate in the Truancy Diversion Program, then they would be referred to the formal juvenile calendar and the Court would issue a summons.[27]

On review, the Court found that the after-enacted Order set forth substantive procedural requirements for the arraignment that mirrored the arraignment procedures of Rule 9 of the Family Court Rules of Juvenile Proceedings.[28] Thus, the Order mooted the plaintiffs' claim that the defendants violated their due process rights by failing "to provide adequate information regarding individual rights at the arraignment, as is required by Rule 9 of the Family Court Rules of Juvenile Proceedings."[29] Prior to the issuance of the Order, each child who participated in the Truancy Program was required to sign a "Waiver of Rights Form," which waived the child's right to a trial, "'right to an appeal to the Supreme Court from any decision or finding of delinquency or waywardness,'" and right to appeal any sentence imposed by the Court after such finding or admission of sufficient facts.[30] The Court determined, after the Order, a child needs to sign only the "Participant Guidelines" form as in the Order there is no reference to the "Waiver of Rights" form; today, "no child is required to sign

26. *See Bedrosian*, 57 A.3d at 275 (citing Theta Properties v. Ronci Realty Co., 814 A.2d 907, 912-13 (R.I. 2003)).

27. *Id.* at 275.

28. *See id* at 276. The Order identifies the arraignment as the first meeting between the parent, child, and magistrate. *Id*. The Order states that, at the "arraignment,"

> "the Magistrate will read the truancy petition and will explain the Rhode Island compulsory school attendance laws as well as the requirements of the Truancy Diversion Program consistent with the document entitled *Participant Guidelines*. The Magistrate also will explain the child's right to trial as well as the option for the Truancy Diversion program consistent with the form entitled *Participant's Forum Choice*."

Id. (emphasis in the original).

29. *See id.* at 276–77.

30. *Id.* at 277 (citing in relevant part § 14-1-16; Rule 6(e)).

such a form."[31] Accordingly, the Court held that the Order mooted the issue of impermissibly allowing children to waive their constitutional rights.[32] The Order directed magistrates to advise the child and parent "of their right to hire an attorney" and illustrated "how the child or parent [may] obtain assistance of counsel."[33] The Court was satisfied that the Order addressed the plaintiffs' concerns about the method used to inform Truancy Court participants of the right to counsel; thus, the Order mooted the issue of depriving children of a right to counsel.[34]

The Order specified "that participation in the Truancy Diversion Calendar [was] voluntary" and that "the magistrate must 'explain the child's right to trial, as well as the option [to participate in] the Truancy Diversion Program.'"[35] If any participant contests jurisdiction, then the case would be referred to the formal juvenile calendar and a summons would be issued.[36] Consequently, the Court held that the Order remedied any failings existent in establishing personal jurisdiction within the Truancy Court over participants, and thus, mooted the issue.[37]

Further, the Order required that "'[all] Truancy Diversion Programs hearings will be recorded;'" [and] the Court determined audio recording was sufficient.[38] The Order made it perfectly clear that the Truancy Court would record all hearings, and therefore mooted the plaintiffs' challenge about failing to transcribe or record the proceeding.[39] The Order also clarified that magistrates have discretion to determine when the Truancy Court ought to make an interpreter available for a child who may not be sufficiently fluent in English.[40] As this Court has held, the trial justice is given wide discretion to determine when an

31. *Id.* at 277.
32. *Id.* at 278.
33. *See id.* at 277–78. The Order laid out that if the parent "[could not] afford an attorney, the case [would] be scheduled on the formal juvenile calendar," and in this event the child could be referred to the services of the public defenders or court-appointed counsel. *Id.* at 278.
34. *See id.*
35. *Id.* at 278 (citation omitted).
36. *Id.*
37. *See id.* at 279.
38. *Id.*
39. *Id.* at 279.
40. *Id.* at 280.

interpreter is appropriate;[41] thus, this Court held that the Order provided for constitutional access to interpreters and that the complainants' constitutional challenge was moot.[42] As to the final constitutional challenge, while the Order did not address the issue of *ex parte* communication, the Court was confident "that the judicial officers of the Family Court [would be] faithful to the law on *ex parte* communication."[43] The earlier Truancy Court procedures were not affecting any ongoing truancy petitions; therefore, the Court held that the "plaintiffs' request that the Superior Court declare the previous [Truancy Court] procedures unconstitutional and enjoin the Family Court from enforcing the prior procedures ha[d] become moot" because the plaintiffs did not have a stake in a continuing controversy.[44]

B. *Exceptions to Mootness*

While the Court held that the Order and existing law mooted and/or obviated the plaintiffs' ten constitutional challenges, that did not end the Court's analysis. [45] The Court then discussed if the Truancy Program was subject to any exception to the mootness doctrine, as the Court "will review an otherwise moot case only when the issues are 'of extreme public importance, which are capable of repetition but which evade review.'"[46] If the issue in this case (students' and parents' rights allegedly being violated by a program aimed at helping them) was one of extreme public importance, then the chief judge of the Family Court addressed the issues by issuing the Order, which contained proper procedures for the Truancy Court to protect participants' rights.[47]

41. *Id.* at 280 (citing State v. Ibrahim, 862 A.2d 787, 798 (R.I. 2004)).

42. *See id.*

43. *Id.* at 280. "Under the Administrative Procedures Act, Department of Human Services (DHS) hearing officers were prohibited from engaging in *ex parte* communications concerning adjudicatory facts with DHS staff members and outside resources about medical assistance applicants' pending cases without giving applicants an opportunity to challenge the information gleaned through such communications." *See also id.* at 280 n.35 (citing Arnold v. Lebel, 941 A.2d 813, 819–21 (R.I. 2007)).

44. *Id.* at 280, 283.

45. *Id.* at 280.

46. *Id.* at 281 (citation omitted) (quoting Campbell v. Tiverton Zoning Board, 15 A.3d 1015, 1022 (R.I. 2011)).

47. *Id.*

While there may be an exception to the mootness doctrine "if there is a substantial likelihood that the challenged statutory language will be reenacted," here, the Court found that the defendants did not show any intention to reenact the earlier administrative language;[48] therefore, the Court held that the defendants' injunctive and declaratory relief are mooted.[49] The Court noted that the plaintiffs offered "no reason to expect that the Family Court would repeat the alleged constitutional violations that were superseded by the Order,[50] and the Court reasoned that even if the matter is capable of repetition it would not evade review as the rulings of the Truancy Court are reviewable as a matter of law.[51] The Court found that this case was not subject to any exception to the mootness doctrine, and therefore, this Court could not decide this case on its merits.[52]

COMMENTARY

The Rhode Island Supreme Court clearly acknowledged that justiciability is a threshold issue that must be satisfied before a court can decide a case on the merits.[53] Here, the after-enacted Order undoubtedly had an effect on the plaintiffs' stake in the case. Prior to the Order, there was no clear standard for the number of absences from school that were required to potentially incur liability for truancy, a child facing truancy charges had to sign a "Waiver of Rights Form,"[54] and a child had no guarantee that the Intake Department would perform a preliminary investigation or that the Truancy Program hearings would be recorded.[55] However, in the wake of the Order, the Family Court

48. *Id.* "'When a party challenges an ordinance and seeks injunctive relief, a superseding ordinance moots the claim for injunctive relief.'" *Id.* at 282 (quoting Covenant Christian Ministries, Inc. v. City of Marietta, Georgia, 654 F.3d 1231, 1239 (11th Cir. 2011)).

49. *Id.* at 281.

50. *Id.* at 282.

51. *See id.* (citing R.I. GEN. LAWS ANN. § 8-10-3.1 (d), (e) (West)).

52. *Id.* at 282.

53. *Id.* at 271–72 (citation omitted).

54. *See id.* at 273. In the "Waiver of Rights Form," the child waived his right to a trial by a judge and right to appeal a guilty verdict or any sentence imposed. *Id.* at 277.

55. *Id.* at 274, 279.

took care of these and other alleged procedural problems within the administration of cases in Truancy Court; the Order clarified the role of the Truancy Diversion Program, the duties of the Intake Department, magistrates, and administrators, and the options available to the parents and children invited to participate in the Truancy Diversion Program.[56] Thus, the Rhode Island Supreme Court was right to focus on the issue of mootness.

From the holding, it appears that the Court has faith in the Family Court and trusts them not to reenact the questionable procedures that were in place before the issuance of the Order.[57] The Court noted that if a Government's "self-stop" of allegedly illegal conduct appears genuine, then it provides a safe basis for a dismissal based on mootness.[58] Perhaps the Court trusted the magistrates also because the Court wanted to support the Truancy Program as even the Order sets forth a laudable goal for the program.[59] If the Court found the Truancy Court procedures inadequate because the procedures did not address *ex parte* communication, then it could have undermined a program that is aimed at providing children the ability to receive necessary services within their community.[60]

Also, the Court was aware that in the plaintiffs' initial complaint, the plaintiffs sued six municipalities; all of the municipal defendants except Providence agreed to stop participating in the Truancy Program.[61] Consequently, in the amended complaint, the plaintiffs added four more municipal defendants.[62] If the Court was not to analyze the justiciability of the plaintiffs' claims and allowed the case to continue in Superior Court, then it is possible that more municipalities would agree to stop participating in the Truancy Program as a result of the

56. *See id.* at 268, 274, 280.

57. *Id.* at 282.

58. *Id.* at 281 (citing Bench Billboard Co. v. City of Cincinnati, 674 F.3d 974, 981(6th Cir. 2012)).

59. The Order set forth that "[t]he purpose of the Rhode Island Family Court Truancy calendar [was] to reduce truancy statewide," and "ensure that students not only attend[ed] school but also receive[d] the rehabilitative services and educational services that [would] help to assure school attendance and academic success." *Id.* at 265.

60. *See id.* at 263.

61. *Id.* 264 n.5.

62. *Id.* at n.5.

suit.[63] As the Truancy Program is aimed at reducing truancy and providing truant children with needed services, ceasing to offer the Truancy Program would harm children and the Rhode Island education system.[64] Lastly, the Court stressed in its analysis of many of the constitutional challenges that participation in the Truancy Diversion Program is voluntary, and the Order specified that a magistrate, at an arraignment, will inform the child and parent of their option to participate in the program, or if they do not wish to participate in the program, the case will be referred to the formal juvenile calendar.[65] Correctly, the Court may have been eager to end this case because the new procedures contained in the Order addressed the constitutional challenges, and municipalities deciding as a result of this case to stop offering the option for truant children to participate in the Truancy Program, detracts from the Rhode Island diversion and development programs intended to benefit delinquent children.[66]

CONCLUSION

The Rhode Island Supreme Court quashed the Order of the Superior Court and remanded the record to that tribunal, with directions to enter a final judgment dismissing the plaintiffs' civil action as moot, because the issuance of Family Court Administrative Order 2010-2 coupled with other existing law removed any controversy in which the plaintiffs have a stake.

Alicia Bianco

63. *See id.*

64. *See* "Truancy Court," Official Website of the City of Warwick, Rhode Island;http://www.warwickri.gov/index.php?option=com_content&view=article&id=845&Itemid=176 (last visited Nov.16, 2013).

65. *See Bedrosian*, 57 A.3d at 275.

66. *See Juvenile Justice in RI: Issue Brief* RHODE ISLAND KIDS COUNT 1, 1, 8 & 9 (July 2009), available at http://www.tapartnership.org/events/webinars/webinarArchivespresentationSlides/20100811_juvenileJusticeIb.pdf (Discussing how Rhode Island development and diversion programs benefit juveniles in Rhode Island).

Family Law. *McCulloch v. McCulloch*, 69 A.3d 810 (R.I. 2013). In a divorce action, a trial justice must determine the value of a closely held corporation before assigning portions to the parties. In assigning a minority share of a closely held corporation, a trial justice must apply a minority discount or a discount for lack of marketability.

FACTS AND TRAVEL

On February 14, 1989, Hope Billings McCulloch ("Hope") and James Robert McCulloch ("James") were married.[1] On June 16, 2006, following a separation in early 2005, Hope filed a complaint for an absolute divorce.[2] Thereafter, on May 7, 2007, James filed an answer and counterclaim.[3] Both parties listed "irreconcilable differences which caused the irremediable breakdown of the marriage" as grounds for divorce.[4]

On October 17, 2008, Hope and James entered into a consent order that incorporated numerous agreements and stipulations the parties agreed to during prior proceedings.[5] The consent order set the valuation date of marital assets "as of the date of trial" and stated neither party can challenge any valuation based on the date of the valuation (or appraisal) or "any change in circumstances surrounding the valued assets . . . unless such change of circumstances is determined by the trial justice to be an extraordinary change in circumstances that could not have been contemplated by the parties."[6]

1. McCulloch v. McCulloch, 69 A.3d 810, 813 (R.I. 2013).
2. *Id.* at 813–14.
3. *Id.* at 814.
4. *Id.*
5. *Id.*
6. *Id.* The Court noted the following "pertinent" provisions of the consent order:

> 31. Neither party shall challenge: a) the date of valuation of any appraisal of real estate, equipment, machinery or the parties' possessions by any expert after October 1, 2007, or b) the date of the valuation of Microfibres, Inc. by any expert after October 1, 2007.
>
> 32. For purposes of the rule that marital assets should be valued as of the date of trial unless there are compelling circumstances warranting a deviation, and by agreement of the parties, the dates of appraisals and valuation referenced in paragraph 31 above shall be considered as if they were appraised on the date of trial. 33. Nothing in paragraphs 31 or 32 above shall impair or prejudice the rights of either party to challenge any valuation or appraisal on the merits, other than based on: 1) the date of the valuation or appraisal, or 2)

The core issue throughout the proceedings in the Family Court was the distribution of the stock of Microfibres, Inc. ("Microfibres") and Microfibres Partnership Limited ("MPL").[7] James is the president and chief executive officer of Microfibres, which manufactures fabric, and MPL, which is an affiliated company that owns certain equipment and real estate in North Carolina.[8] At trial, the chief financial officer of Microfibres, Mary Ann Beirne, testified that Microfibres planned to purchase a controlling interest in a company in China ("the China venture"), and if the plan "were to fall through," Microfibres would be devastated.[9]

In order to determine the value of Microfibres and MPL, three experts testified at trial.[10] First, on behalf of Hope, Peri Ann Aptaker ("Aptaker"), a certified public accountant ("CPA"), testified that as of December 31, 2007, the fair market value of Microfibres was $126,365,000.[11] Aptaker further testified she could not value the China venture because she had no data to calculate an impact, if any, the venture would have on Microfibres.[12] The second expert was John Brough, Jr. ("Brough, Jr."), CPA, and testified on behalf of James.[13] Contrary to Aptaker, Brough, Jr. concluded Microfibres was worth $106,000,000, but similarly testified there was no information to place value on the China venture, which was not closed as of

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> any change in circumstances surrounding the valued assets from February to May 27, 2008, unless such change of circumstances is determined by the trial justice to be an extraordinary change in circumstances that could not have been contemplated by the parties, provided, however, that the party in possession of any asset shall not claim, contend or urge that any such extraordinary change of circumstances shall have occurred with respect to any such asset unless he or she has disclosed such change of circumstances promptly and in no event more than three business days after the change in circumstance having occurred.

Id.

7. *Id.* at 813.
8. *Id.*
9. *Id.* at 814. More specifically, the company in China performed printing and dyeing. *Id.*
10. *Id.*
11. *Id.* at 815.
12. *Id.*
13. *Id.* at 814.

December 31, 2007.[14] The last expert, Jay Fishman ("Fishman"), was a neutral, court-appointed expert.[15] Fishman testified that since the December 31, 2007 valuation date, there had been a collapse in the financial market that impacted consumer spending and the loss of millions of jobs.[16] Fishman also concluded that, like Aptaker and Brough, Jr., he received insufficient information to value the China venture and, therefore, as of December 31, 2007, he was also unable to value the China venture.[17]

On April 9, 2009, James submitted a post-trial memorandum in which he argued the trial justice could not reasonably place a value on Microfibres based on the experts' testimony at trial regarding the downturn of worldwide economy that occurred after the valuation date contained in the consent order.[18] James contended the economic crisis was "an extraordinary circumstance that was not anticipated by the parties" and therefore, the "arbitrary valuation date" should not be utilized.[19] On August 7, 2009, while conducting a hearing on an unrelated motion, the trial justice informed the parties he planned "to order a re-valuation of Microfibres as of a more current date."[20] In response, on August 21, 2009, Hope filed an "objection to and motion for reconsideration of the trial justice's decision to revalue [Microfibres]."[21] On August 27, 2009, the trial justice held a hearing on Hope's motion, denied the motion, and ordered the companies to be revalued as of September 1, 2009.[22] However, on January 19, 2010, the trial justice ordered the parties to suspend their revaluation efforts because "he had decided to equitably distribute the stock of the companies without placing a value on them."[23]

On August 17, 2010, the trial justice issued his written decision granting the parties an absolute divorce.[24] After awarding Hope and James joint custody of Lucas, their son, the

14. *Id.* at 815.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* at 824.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 815.

trial justice focused on the equitable assignment of the marital property.[25] Excluding Mircofibres and MPL, the trial justice first examined each factor[26] set forth in G.L. 1956 § 15-5-16.1(a) and then awarded each party fifty percent of their bank and investment accounts and divided the property.[27]

The trial justice then turned to the "knotty" issue of the equitable distribution of Microfibres and MPL.[28] The trial justice declared that the stock in Microfibres is a marital asset, but only 49.9967 percent of MPL was marital property since the remainder had been gifted to James.[29] Rather than valuing the companies and assigning a portion of that value to each party, the trial justice ordered an in-kind distribution[30] of stock of Microfibres

25. *Id.*

26. Under § 15-5-16.1(a):

> In determining the nature and value of the property, if any, to be assigned, the court after hearing the witnesses, if any, of each party shall consider the following:
>
> (1) The length of the marriage;
>
> (2) The conduct of the parties during the marriage;
>
> (3) The contribution of each of the parties during the marriage in the acquisition, preservation, or appreciation in value of their respective estates;
>
> (4) The contribution and services of either party as homemaker;
>
> (5) The health and age of the parties;
>
> (6) The amount and sources of income of each of the parties;
>
> (7) The occupation and employability of each of the parties;
>
> (8) The opportunity of each party for future acquisition of capital assets and income;
>
> (9) The contribution by one party to the education, training, licensure, business, or increased earning power of the other;
>
> (10) The need of the custodial parent to occupy or own the marital residence and to use or own its household effects taking into account the best interests of the children of the marriage;
>
> (11) Either party's wasteful dissipation of assets or any transfer or encumbrance of assets made in contemplation of divorce without fair consideration; and
>
> (12) Any factor which the court shall expressly find to be just and proper.

R.I. GEN. LAWS § 15-5-16.1(a) (2013).

27. *McCulloch*, 69 A.3d at 815–816 n.3 (citing § 15-5-16.1(a)).

28. *Id.* at 817.

29. *Id.*

30. An in-kind distribution refers to the allocation of a portion of the *actual* asset, as opposed to the sum of money representing the *value* of the

and an in-kind distribution of a partnership interest in MPL.[31] The trial justice stated he was unable to accurately place a value on the companies and found the fair and equitable method was to assign Hope a portion of the corporate stock, rather than a sum of cash.[32]

In deciding what portion of stock to assign to Hope, the trial justice examined Hope's "contribution" to the companies and the factors announced in § 15-5-16.1.[33]

> [T]he trial justice found that Hope made little or no contribution to [Microfibres or MPL]. It was a family business in the family of [James] for multiple generations. * * * Notwithstanding th[e] finding [that Microfibres was a marital asset], [Hope] ha[d] in no significant way done anything to contribute towards the acquisition, preservation or appreciation or the corporate assets.[34]

The trial justice continued, stating the "limit" of Hope's contribution was decorating a property owned by the corporation, but Hope "served as a homemaker and as such [wa]s entitled to a share of the marital assets."[35] Nevertheless, the trial justice continued, declaring "it would be completely inequitable" for Hope to receive a portion of Microfibres equal to James, "whose blood, sweat and tears and contributions by his family ha[d] been the reason for both the past success and what hopefully w[ould] be the future success of th[e] company."[36] Thereafter, the "trial justice awarded Hope 25 percent" of the stock in Microfibres and 25 percent of that portion of MPL determined as marital property, leaving the remainder 75 percent of those assets to James.[37]

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asset. *See* Stephen W. Schlissel, *The Hazards of "In-Kind" Distributions of Closely-Held Stock in Divorce Actions*, 17 J. Am. Acad. Matrimonial Lawyers 381, 383 n.11 (2001).

31. *Id.*
32. *Id.*
33. *Id.* at 818.
34. *Id.*
35. *Id.* (internal quotation marks omitted).
36. *Id.* (internal quotation marks omitted).
37. *Id.*

ANALYSIS AND HOLDING

The Supreme Court consolidated Hope and James's appeals from the Family Court decision.[38] Hope's appeal presented eight reasons the trial justice erred in his decision.[39] The Court began with Hope's contention that the trial justice incorrectly determined the percentage of MPL that was marital property.[40] Because it was undisputed that Microfibres owned 10 percent of MPL and James conceded 49.9967 percent of MPL is marital property, it was the remaining 40.0033 percent of MPL at issue.[41] Applying the abuse of discretion standard, the Court upheld the trial justice's finding that James owned 20 percent of MPL before marriage, and thus was not part of the marital estate, since the record supported the finding.[42] Specifically, the Court stated the trial justice's finding regarding the 20 percent interest "was perhaps not as explicit as it could have been," but there was no error because the trial justice chose to accept James's testimony that James had a 20 percent interest in MPL prior to marriage.[43]

Regarding the remaining 20.0033 percent of MPL at issue, the

38. *Id.*

39. *Id.* at 819–20. Hope's eight reasons were the following:

> (1) in his determination of the percentage of MPL that was marital property; (2) by declining to place a value on Microfibres before dividing the marital estate; (3) by disregarding the consent order that set forth the date as of which the marital property was to be valued; (4) by assigning Hope 25 percent of Microfibres, thereby making her a minority shareholder in a closely held corporation; (5) by declining to award Hope alimony; (6) by awarding Hope only $1,000 per week in child support; (7) by declining to award Hope fees for her attorneys, experts, and the supervisor of James's visits with Lucas; and (8) by declining to order the disclosure of certain documents and information concerning James's will, trusts, and estate plans.

Id.

40. *Id.* at 819. The Court notes the three-step procedure for the equitable distribution of property in a divorce action. *Id.* at 820 (stating the three steps, "(1) determining which assets are marital property; (2) considering the factors set forth in G.L. 1956 § 15-5-16.1(a); and (3) distributing the property").

41. *Id.* at 820.

42. *Id.* at 819–20. The Court grants the trial justice "broad discretion" regarding the equitable distribution of marital assets and the Court will not overturn the distribution unless the trial justice abused his or her discretion. *Id.* at 818–19.

43. *Id.* at 820–21.

Court applied the abuse of discretion standard and found no error in the trial justice's finding that James's father gifted the 20.0033 percent to James, and therefore, that portion was not marital property.[44] The Court relied on the existence of three documents, within the record, that were labeled as deeds of gift.[45] Additionally, the Court noted that the record was without evidence to disprove the transfer of the 20.0033 percent interest was a gift.[46]

Hope's second argument considered on appeal was whether the trial justice erred in assigning percentages of Microfibres and MPL before placing a value on them.[47] While the Court did not accept Hope's argument that § 15-5-16.1 required a value to be placed on all marital property before the property was assigned, the Court nevertheless held the trial justice abused his discretion when he failed to value Microfibres and MPL before assigning them.[48] The Court reasoned, first, that Microfibres and MPL "constitute such an enormous portion of the marital estate."[49] Relying on the parties' experts, the Court explained the value of the companies as of December 31, 2007 was between $106 million and $126 million.[50] Additionally, even though the value of Microfibres and MPL may have swayed since that date, it could not be disputed that the companies created "the vast majority of the marital estate."[51]

"More importantly," the Court held the trial justice abused his discretion when he did not "place a value on the specific portions of Microfibres and MPL that he assigned to the parties" because "he assigned the parties unequal percentages, thereby rendering Hope a minority shareholder of a closely held corporation."[52] The Court explained that without knowing the values of the portions assigned to each party, it could not review whether the entire

44. *Id.* at 821.
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 822. Hope argued § 15-5-16.1(a) creates a "statutory obligation" that a trial justice to measure the worth of all marital property before it is assigned. *Id.* at 821.
49. *Id.* at 822.
50. *Id.*
51. *Id.*
52. *Id.*

distribution was equitable.[53] The Court recognized "assignment of stock in a closely held corporation, which makes one spouse a minority shareholder, is generally disfavored and should be avoided whenever possible."[54] By not placing value on Microfibres and MPL before assigning them to each party when the trial justice assigned Hope 25 percent of the Microfibres and MPL, a 25 percent minority share would "likely not be the equivalent of 25 percent of the total value of the company."[55] The reason for this discrepancy was twofold: (1) because the stock in a closely held corporation lacks liquidity since there is no established public market for the stock; and (2) because a minority shareholder lacks control over the company and thus, the value of stock "is diluted in comparison to that of a majority shareholder."[56] Therefore, the Court continued, a minority discount or a discount for lack of marketability were "appropriate, and even necessary, when valuing an in-kind distribution of a minority share of a closely held corporation in a divorce action."[57] Alternatively, the Court stated the trial justice could award Hope the cash equivalent of the equitable ownership interest in the companies, and such discounts would not be required.[58]

Without the value determinations of the companies, the Court declined to address Hope's assertion that an assignment of 25 percent of Microfibres and MPL was inequitable since the value could not be compared to the remainder of the marital estate.[59] Because the Court was unable to fully review the distribution of the marital estate, the Court further declined to review Hope's contentions regarding alimony and child support.[60]

Turning to Hope's argument that the trial justice erred when he ignored the October 17, 2008 consent order, in which the parties agreed to a valuation date for the marital property, the Court held "the manner in which the trial justice made his

53. *Id.*

54. *Id.* However, the Court takes note that it is not always error when the distribution of stock in a closely held corporation results in one spouse as a minority shareholder. *Id.*

55. *Id.*

56. *Id.* at 822–23.

57. *Id.* at 823.

58. *Id.*

59. *Id.*

60. *Id.* at n.6 (noting the analysis for both issues depends on the trial justice's assignment of marital property on remand).

decision to disregard the valuation date was error," but the error did not require the matter be remanded for a rehearing.[61] Pursuant to paragraph thirty-three of the consent order, James challenged the valuation date based on a change in circumstances.[62] However, the trial justice never formerly ruled on James's posttrial memorandum, but rather "deviated from the terms of the consent order," constituting error.[63] Nevertheless, the Court reasoned that remanding the matter would not likely change the trial justice's decision to abandon the valuation date contained in the consent order.[64]

The Court next turned to Hope's argument regarding reimbursement of fees based on James's conduct in the case.[65] Interpreting Hope's request for attorney fees as a sanction on James, the Court noted such a remedy is only available in three narrow instances, of which only the third applies here: "when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'"[66] Applying abuse of discretion review, the Court reasoned Hope failed to show that James "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[67] Regarding Hope's argument that James should be required to reimburse the marital estate for the hired experts and for the costs of the supervised visits between James and their son, the Court found no error.[68]

In response to Hope's last argument that the trial justice erred when he denied her request that James disclose certain documents about his will, trusts, and other estate plans, the Court

61. *Id.* at 825.
62. *Id.*
63. *Id.* (noting the sanctity the law confers upon consent orders).
64. *Id.*
65. *Id.* at 826.
66. *Id.* (quoting Chambers v. NASCO, Inc., 501 U.S. 32, 45–46 (1991)). The other two narrow circumstances in which the Court has exercised its "inherent power to fashion an appropriate remedy that would serve the ends of justice" are: "(1) pursuant to the 'common fund exception' that 'allows a court to award attorney's fees to a party whose litigation efforts directly benefit others[,]'* * *; (2) 'as a sanction for the willful disobedience of a court order[,]' * * *." *Id.* The Court states Hope did not argue these two circumstances exist. *Id.*
67. *Id.* at 826–27 (quoting *Chambers*, 501 U.S. at 45–46).
68. *Id.* at 827 (reasoning Hope did not cite a case or legal authority to support her argument).

found no abuse in the trial justice's discretion.[69] The Court reasoned the trial justice was within his broad discretion to deny Hope's discovery request for James's will and estate plans.[70] Moreover, review of the trial justice's denial of Hope's motion to compel disclosure of James's trusts was premature because the Court was already requiring a new equitable distribution of the marital estate.[71]

Lastly, turning to James's protective and conditional cross-appeal, the Court upheld the trial justice's finding that the transfer of stock of Microfibres was a sale, not an inheritance.[72] Responding to James's contention that he and his father intended the transfer of stock as an inheritance, the Court stated, "[w]hen a contract is unambiguous, * * * the intent of the parties becomes irrelevant."[73] The evidence documenting the transfer of stock used the terms "purchase" and "sale" and "included all indicia of a sale," thereby making the parties' intent irrelevant.[74] Thus, the Court concluded, "the transfer of Microfibres stock was, in fact, a sale."[75]

COMMENTARY

At a glance, requiring the trial justice to place a value on "an in-kind distribution of a minority share of a closely-held corporation in divorce action," precluded the Rhode Island Supreme Court from considering whether the trial justice's distribution was truly equitable.[76] However, the Court's ultimate holding, that required a trial justice to place a value on the closely held corporation before portions of it were assigned to each spouse, presented equitable goals. The Court held that a trial justice's assignment of unequal percentages (of a closely held corporation), which rendered a spouse a minority shareholder, was an abuse of

69. *Id.* at 827–28.
70. *Id.* at 828.
71. *Id.*
72. *Id.* at 829 (internal quotation marks omitted).
73. *Id.* (quoting Vincent Co. v. First National Supermarkets, Inc., 683 A.2d 361, 363 (R.I. 1996)).
74. *Id.* at 830.
75. *Id.* at 829.
76. *See id.* at 823 (stating, "because we are satisfied that this case required these value determinations, we decline to address Hope's contention that an assignment of only 25 percent of Microfibres and MPL to her was inequitable . . . ").

discretion.[77] This line of reasoning stemmed from the equitable precept that a minority share of a closely held corporation was likely not the equivalent percentage of the total value of the company.[78] The case illustrates this point: if Hope was assigned a 25 percent minority share in the company, then she would be assigned illiquid assets with no ready market and left with no control over the company.[79] Essentially, the Court rejected the trial justice's assignment because it was inequitable—though the Court does not use this term—and, therefore, mandated application of a minority discount or a discount of marketability.[80]

On the other hand, by remanding the case to determine values of the companies before portions are assigned, the Court's decision avoided the analysis of equitable factors in § 15-5-16.1(a).[81] While review of the trial justice's application of the enumerated factors would be premature, the Court's disregard for the analysis beckons questions relating to the notions of fair and equitable distribution of marital assets.[82] For instance, when the trial justice applied the factors from § 15-5-16.1(a), he "awarded each party 50 percent of their bank and investment accounts and 50 percent of one of their country club memberships."[83] Further, other assets were divided fairly equally, as Hope was assigned one home and its contents, two automobiles in her possession, and all jewelry in her possession, and James was assigned two homes and their contents, two vacant lots, a remaining golf club membership, and the jewelry in his possession.[84] While the trial justice assigned other assets equally, he awarded Hope only 25 percent of the stock in the companies.[85] The discrepancy begs the question of what else the trial justice considered beyond the enumerated factors in § 15-5-16.1(a).

The trial justice's statements provide a backdrop for factors

77. *Id.* at 822.
78. *Id.*
79. *Id.* at 823.
80. *Id.*
81. *Id.*
82. *Id.* (noting the Court cannot review whether Hope's 25 percent assignment is equitable in comparison with James's 75 percent until value is placed on the companies).
83. *Id.* at 817.
84. *Id.*
85. *Id.* at 818.

he considered outside of those enumerated in § 15-5-16.1(a).[86] Specifically, the trial justice mentioned the fact that Microfibres "was a business in the family of [James] for multiple generations" and "that it would be completely inequitable" for Hope to receive an equal portion of the companies as James, "whose blood, sweat and tears and contributions by his family ha[d] been the reason for both the past success and what hopefully w[ould] be the future success."[87] Therefore, the trial justice's statements provided two considerations outside of those enumerated in the statute: (1) the fact that the companies were family businesses; and (2) which party's family the businesses were associated with.[88] It could be inferred that the trial justice's contemplation of the fact Microfibres and MPL were James's family businesses led him to award Hope 25 percent of the stock in the Microfibres and MPL since, after consideration of the statutory factors, he divided other marital assets fairly equally.[89]

The Court's opinion did not confront the trial justice's analysis of § 15-5-16.1(a), thereby tacitly allowing the family courts to apply both the enumerated factors therein, but also any other considerations the trial justices see fit.[90] The trial justice recognized Hope contributed to the couple's income and that she "played the role primarily of homemaker," but found that Hope "made little or no contribution to [Microfibres or MPL]" and subsequently awarded Hope only 25 percent of the stock in the companies, while dividing other marital assets equally.[91] Further, the trial justice undermined Hope's contributions as homemaker when he considered the fact that James hired a nanny or household help "in order to reduce the homemaker's responsibilities" and that James also contributed to the cooking and child care.[92] The trial justice's analysis inferred that Hope did not contribute *enough*, whether as homemaker or to the

86. *Id.*
87. *Id.*
88. *Id.*
89. This analysis focuses on Hope's assignment of 25 percent in the companies in comparison to the equal distribution of other marital assets, rather than the *value* of the 25 percent assignment itself.
90. *McCulloch*, 69 A.3d at 823 (stating, "this case required value determinations" and thus declining to review whether the assignment was equitable).
91. *Id.* at 816, 818.
92. *Id.* at 816.

companies, to entitle her to an equal portion in the companies as James. Perhaps, if James did not hire a nanny, or, if Hope performed all of the family's cooking, the trial justice's assignment would have been different. It may be possible the trial justice merely believed James was entitled to a substantially larger portion of the companies because they began through *his* family. Despite these speculations, the Court remanded the case in order to place a value on Microfibres and MPL and trial justices are thus left to choose how much weight to give to the factors in § 15-5-16.1(a) and whether to give weight to outside factors.

CONCLUSION

The Rhode Island Supreme Court held a trial justice must value a closely held corporation before assigning portions to the parties in a divorce action.[93] Further, in a divorce action, a minority discount or a discount for lack of marketability must be applied in the distribution of a minority share of a closely held corporation or the spouse receiving the minority share would be assigned "illiquid assets that have no ready market" and "left with no control of the companies."[94]

Sydney Kirsch

93. *Id.* at 822–23.
94. *Id.* at 823.

Insurance Law. *American States Ins. Co. v. LaFlam*, 69 A.3d 831 (R.I. 2013). Contractual provisions in uninsured/underinsured auto insurance policies that attempt to limit the period in which the insured has to file a claim against the insurer to a period lesser than the statutory period *and* start the limitation from the date of the accident are unenforceable because they are against public policy.

FACTS AND TRAVEL

Joann LaFlam ("LaFlam") claimed that she suffered serious injuries when she was involved in an automobile accident on April 25, 2007.[1] The car that LaFlam was driving was insured through her employer with a policy from American States Insurance Company ("ASIC").[2] The policy included coverage for up to one million dollars in protection from uninsured ("UM")/underinsured motorists ("UIM").[3] Within the policy was a time-bar clause that, in part, stated that any legal actions brought under the policy must be brought within three years from the date of the accident.[4]

On April 3, 2008, LaFlam sent notice to ASIC that she may have a claim under the UIM coverage.[5] ASIC then asked LaFlam for information regarding the claim and made several similar information requests through May of 2009.[6] LaFlam was contractually obligated to seek authorization from ASIC before settling her UIM claim.[7] So on January 25, 2010, she sent the authorization request, which was approved by ASIC on February 18, 2010.[8] LaFlam then settled her claims against the UIM tortfeasors.[9] On May 19, 2010, LaFlam demanded one million dollars from ASIC as payout for her UIM coverage.[10]

Rather than simply denying the claim, on August 25, 2010, ASIC filed an action in the United States District Court for the

1. American States Ins. Co. v. LaFlam, 69 A.3d 831, 832–33 (R.I. 2013).
2. *Id.* at 833.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

District of Rhode Island for declaratory-judgment.[11] ASIC sought a declaration stating that any legal claim LaFlam may have against ASIC under the policy was time-barred because it was now over three years since the date of LaFlam's accident which was April 25, 2007.[12] The parties each submitted a motion for judgment on the pleadings, the main issue of which was whether the time-bar clause was enforceable or not based on public policy grounds.[13] The District Court found that the time-bar clause did not violate public policy and was, therefore, enforceable under Rhode Island law.[14]

LaFlam appealed to the United States Court of Appeals for the First Circuit and moved for certification of two questions to the Rhode Island Supreme Court.[15] The first question was whether or not a three-year time limit to bring a claim under UM/UIM coverage violated public policy.[16] The second question was whether or not the time limit to bring an UM/UIM claim begins before the insured knows for certain she will make an UM/UIM claim.[17] The First Circuit decided that the two questions were interrelated because a short time limit may bar a person from filing a claim since time may run out before the person knows that she even has a claim.[18] The Court of Appeals, therefore, combined the two questions into one, certifying them to the Rhode Island Supreme Court by asking if under "the UM/UIM statute and Rhode Island public policy, would Rhode Island enforce the two provisions of the contractual limitations clause in this case?"[19]

The Rhode Island Supreme Court agreed to answer the question which essentially asked whether ASIC's requirement that LaFlam initiate legal action within three years from the date of the accident was enforceable and in accordance with Rhode Island Public Policy.[20]

11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.* at 833–34.
15. *Id.* at 834.
16. *Id.* at 833 n.5.
17. *Id.*
18. *Id.* at 834.
19. *Id.* at 838.
20. *Id.* at 834, 838.

ANALYSIS AND HOLDING

The Court held that the time-bar clause included in ASIC's UM/UIM coverage was unenforceable because it was against public policy.[21] The Court came to this holding by first examining the purpose of the RI Statute requiring insurers to offer UM/UIM protection as well as the history of rulings surrounding the statute in order to get a better picture of the public policy considerations involved in this case.[22] The Court then examined the effects of a time-bar clause that begins running on the date of an accident, and how it would work against those policy considerations.[23] The Court concluded by making it clear that the three-year time-bar clause was unenforceable because it began to run before LaFlam had a cause of action against ASIC *and* because it shortened the statutory limitations period.[24]

A. *The Public Policy of UM/UIM Coverage*

The Court began its exploration of public policy by stating the purpose and limitations of the statute requiring insurers to offer UM/UIM coverage.[25] The Court cited several cases that have explained the legislature's primary purpose in enacting the statute was that insured motorists are indemnified when involved in an accident with an underinsured or uninsured motorist.[26] The Court went on to explain that these UM/UIM contracts should be interpreted with respect to the public policy considered by the legislature.[27] Accordingly, if contract provisions work to restrict coverage, those contract provisions will be void.[28] That is not to say that all limitations to recovery are void, however, reasonable limitations that work to protect insurers have been upheld.[29]

21. *Id.* at 845.
22. *Id.* at 835–38.
23. *Id.* at 835–45.
24. *Id.* at 845.
25. *Id.* at 835 (referring to R.I. GEN. LAWS § 27-7-2.1).
26. *Id.; see also* Henderson v. Nationwide Insurance Co. 35 A.3d 902, 906 (R.I. 2012); Nationwide Mutual Insurance Co. v. Viti, 850 A.2d 104, 107 (R.I. 2004); Aetna Casualty & Surety Co. v. Graziano, 587 A.2d 916, 917, 919 (R.I. 1991).
27. *LaFlam*, 69 A.3d at 839.
28. *Id.* at 836.
29. *Id.* at 836–37.

B. *Effects of a Time-Bar Clause That Accrues at the Date of Accident*

The Court then turned its attention to what it found to be the most troubling part of ASIC's time-bar clause: the date the limitations period begins.[30] There were no Rhode Island cases specifically on point as to when UM/UIM cause of actions accrue, so the Court first addressed ASIC's argument that starting the limitation period on the date of the accident was analogous to prior Rhode Island case law that established that prejudgment interest on UM/UIM claims begin to accrue on the date of the accident.[31] If the insurer's contractual duties began to run at that date, ASIC argued, the limitations period should begin at that date as well.[32] The Court rejected the analogy by distinguishing the "very different" issues of the date when prejudgment interest begins accruing and when UM/UIM causes of action accrue.[33]

The Court then examined the law in other jurisdictions as to when the limitation period starts to run and made the decision to adopt the majority approach.[34] The majority of jurisdictions have held that the limitations period began on the date the insurer denied coverage benefits.[35] This makes sense, because, as accepted by the Court, UM/UIM claims are actions in contract.[36] They concluded that the limitations period should, therefore, begin to run at the time of injury of the insured by the insurer, and the insurer does not injure the insured until a breach of the insurance contract occurs.[37]

ASIC attempted what the Court called a "doomsday scenario" argument by arguing that an insured could simply put off filing the claim for years while prejudgment interest accrued.[38] The Court quickly rejected this argument by recognizing that insurance companies have the means to protect themselves from

30. *Id.* at 838–39.
31. *Id.* at 839.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 840.
37. *Id.* at 841.
38. *Id.*

stale claims.[39] Further, the Court found it unlikely that an injured person would want to put off getting "fully compensated any longer than necessary."[40]

As a last-ditch effort, ASIC then argued that the time should begin ticking on the time-bar clause when the insured finds out the limit of the tortfeasor's insurance policy coverage.[41] ASIC explained that it was at this point an insured would know if the UM/UIM coverage would be invoked.[42] The insured could then file suit against the insured and have the proceedings stayed until after a settlement or judgment is rendered against the tortfeasor.[43]

The Court explained that such a scheme would be inefficient and may not always work because an insured might end up being awarded more than initially expected.[44] If the initially expected award is within the tortfeasor's insurance coverage, the insured would not have filed a claim against the insurer.[45] But if the insured is awarded more than initially expected, and beyond the tortfeasor's coverage limit, the insured would not be able to recover the amount above the tortfeasor's coverage limit if the insured's UIM coverage is time-barred.[46] Further, the Court explained that requiring a lawsuit to be filed before a controversy exists would be expensive, time consuming, and utterly pointless except for the reason of allowing insurers to escape payment.[47]

Having dispatched all of ASIC's arguments and joining in the majority approach to UM/UIM contract disputes, the Court examined if the clause at issue could coexist in light of Rhode Island public policy.[48] Would public policy support UM/UIM contracts that both shorten the limitations period from the statutory period and start that limitations period running on a date before the insured has a cause of action against the

39. *Id.* at 841–42.
40. *Id.* at 842.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 842–43.
45. *Id.* at 842.
46. *Id.*
47. *Id.* at 844.
48. *Id.*

insurer?[49] The Court answered in the negative.[50] ASIC's policy would have had LaFlam file suit before ASIC even breached the contract.[51] The Court held that a policy such as this "impermissibly restricts" and "frustrates public policy" with respect to the UM/UIM statute.[52]

COMMENTARY

In terms of the public policy of fairness to the insured, this case was certainly decided correctly, but the decision is less clear when viewed in terms of economic policy. The legislature's public policy concern when enacting the UM/UIM statute was so that an insured can be indemnified from UM/UIM drivers.[53] But implicit within that policy seems to be a concern that insurance actually indemnify an insured, and that insurance not be cost prohibitive. The Court's holding in this case will most likely increase the cost of UM/UIM insurance and work against the same public policy used to uphold their decision against ASIC. The only economic argument raised was brushed aside by the Court as a "doomsday scenario," and probably did not receive the consideration it deserved.[54] Even after an in-depth consideration of the economics at play here, the holding probably would not have been any different under the facts of this case. However, decisions like the one made in this case work to increase liability costs to insurers, and therefore, increase premiums to the insured, the economics of which may create a conflict between the ruling here and the legislature's stated policy purpose.

As far as fairness and justice policy concerns, this was an easy decision to make. If ASIC had been allowed to escape liability by requiring that LaFlam file a legal claim before LaFlam knew that a claim would ever accrue against ASIC, it would have just seemed wrong. This is especially true considering LaFlam kept ASIC up to date on the status of the claim against the tortfeasor for years until the settlement.[55] The claim from LaFlam,

49. *Id.*
50. *Id.* at 845.
51. *Id.*
52. *Id.*
53. *Id.* at 835.
54. *See id.* at 841–42.
55. *Id.* at 833.

therefore, came as no surprise to ASIC. What was surprising, however, was that ASIC initiated court proceedings considering how easily the Court dismissed ASIC's arguments and came to a decision.

There is one argument that the Court should have explored deeper. The argument referred to is the "doomsday scenario" envisioned by ASIC in which the insured sits on their claims for years accruing prejudgment interest instead of pursuing the claim.[56] A deeper exploration probably would not have changed the outcome in this case—the facts in this case made ASIC's "doomsday scenario" look especially weak[57]—but would have provided some guidance to courts in the future when it comes to economic considerations in closer cases.

The Court's dismissal of this argument was based on the idea that an injured person in need of recovery would not put off making a claim and on the fact that an insurer has the means to protect themselves from those who delay making claims.[58] While the Court was probably correct about people in need of recovery seeking recovery as soon as possible, not everyone will need recovery so quickly.

Now that the limitations period begins on a later date than the accident date, there will likely become situations in which an injured person who does not need to recover as soon as possible puts off making a claim in order to accrue interest. Indeed, it is those who can afford to pay for high UM/UIM coverage who would be most able to wait some time without making a claim and who would consider the economic benefits of the statutory interest rate in making the decision on when to file the claim.[59]

56. *See id.* at 841.

57. *See id.* at 833. LaFlam filed suit against ASIC only three months after the three-year limitation period expired. *Id.*

58. *See id.* at 841–42.

59. The statutory interest rate for civil claims is 12% from the date the cause of action accrues; compare this to the 2.4% expected market rate of return in the United States. R.I. GEN. LAWS ANN. § 9-21-10 (West); GuruFocus, *Global Market Valuations and Expected Returns – Sept. 4, 2013*, NASDAQ (Sept. 5, 2013), *available at* http://www.nasdaq.com/article/global-market-valuations-and-expected-returns-sept-4-2013-cm272928. While most people do not have the means to wait for recovery, there do exist some for whom it makes good economic sense to delay making a claim as long as possible while interest accrues. Even if the insurer has the "means" to

While the Court was correct that ASIC's "doomsday scenario" will not likely provide enough "doom" to Rhode Island to rule in favor of ASIC, it can be said with almost equal certainty that the Court's ruling is something for insurers to consider when setting Rhode Island car insurance prices. To add even further to an insurer's considerations, it can be gleaned from this case that there exists some instability in the regulatory environment for insurance contracts. After this case, insurers will need to increase policy prices to offset for the potential higher interest costs as well as any costs that may arise from the perceived regulatory instability.

Insurers will need to protect themselves from the costs that will sprout from this decision. Accordingly, the losses will need to be set off against higher insurance premiums. Considering that the price of an insurance policy is the only barrier to buying more insurance, it follows that insurance prices restrict the coverage that gets purchased. It then further follows that the higher the price of insurance, the more that insurance gets restricted. Rhode Island already ranks among the top states for the highest car insurance costs.[60] The holding in this case will almost certainly increase those prices and restrict coverage even more. The question becomes: Is Rhode Island public policy really better supported with *even higher* car insurance prices?

The price increase that results from this ruling will most likely be slight. The Court was right that there probably will not be many people sitting on claims while interest accrues.[61] Similarly, any regulatory instability might be so slight that insurance companies will probably not increase insurance prices noticeably. As such, the rate increase that results from this case will not be the "straw that breaks the camel's back" as far as people being able to afford UM/UIM coverage. This does not mean, however, that economic policy should not be a consideration in making these rulings.

The fact is that there will *never* be any certain case "that

protect itself from delays, those "means" likely cost more than the time-bar clause in LaFlam's insurance contract.

60. Chris Persaud, *Chart: Car-Ownership Costs by State*, BANKRATE (Aug. 21, 2013), available at http://origin.bankrate.com/finance/auto/carownership-costs-by-state.aspx.

61. *LaFlam*, 69 A.3d at 842.

breaks the camel's back." There will always be cases like this that simply add another "straw." But even though the individual "straws" will not cause a mass exodus of insurance customers dropping their car insurance coverage, it is likely that the "straws" will cause a few people that simply cannot afford to pay more to drop or lower their UM/UIM coverage. Furthermore, there will be those who, when purchasing auto insurance, decide against purchasing UM/UIM coverage or choose to purchase less than they feel they need because of the cost. In these cases, this holding in this case will lead to *less indemnification* of the insured, which is actually against the same public policy that the Court used here to rule in favor of LaFlam.[62]

That is not to say the Court's decision was incorrect. Indeed, the sense of injustice that arose from what ASIC was trying to get away with was palpable, while any economic concerns seem slight. The problem, though, is that economic concerns will usually *always* seem slight. But that does not mean they do not deserve consideration. This is especially true for a case like this in Rhode Island where the cost of car insurance is already among the nation's highest. If they have not already done so, at some point in the future, public policy concerns in regard to indemnification for a policy holder are going to run square into conflict with public policy concerns in regard to a person *being able to afford* to even *be* a policy holder.

CONCLUSION

The Rhode Island Supreme Court was asked whether under "the UM/UIM statute and Rhode Island public policy, would Rhode Island enforce the two provisions of the contractual limitations clause in this case?"[63] The Court answered this question in the negative.[64] The Court found that provisions in UM/UIM auto insurance policies that limit the period in which an insured can file a claim against the insurer *and* which begin the limitation period on a date before the insured accrues a claim against the insurer are unenforceable.[65] Rhode Island public

62. *Id*. at 835.
63. *Id.* at 838.
64. *Id.* at 845.
65. *Id.*

policy with respect to UM/UIM coverage works to ensure indemnification of the insured, and time-bar clauses that "impermissibly restrict" and "frustrate" the public policy considerations are void.[66]

Jeffrey Thomas Waltemate

66. *Id.*

Property Law. *Wellington Condo. Ass'n v. Wellington Cove Condo. Ass'n,* 68 A.3d 594 (R.I. 2013). A dominant estate owner brought an action against a servient estate owner alleging the creation of an express and implied easement over a right of way. The Supreme Court of Rhode Island held that the "condominium declaration did not create [an] express easement for access to [the] alleged dominant estate owner's tennis courts."[1] The Court remanded the issue of an implied easement by grant due to insufficient evidence and ordered fact-finding to determine whether or not the implied easement was apparent, permanent, and necessary for the enjoyment of the dominant estate.

FACTS AND TRAVEL

Wellington Condominium Association, Wellington Hotel Association, John Rizzo, Arthur Leonard, and Frederick Howayeck (collectively, "Plaintiffs") appealed a judgment denying an easement over a parcel of land owned by Wellington Cove Condominium Association, Wellington On The Harbor Condominium Owner's Association, and Harrington Court Condominium, LLC (collectively, "Defendants"). The properties at issue in this case were neighboring condominiums located on Narragansett Bay in Newport, Rhode Island, and were formerly owned by the Wellington Hotel Associates ("declarant") as a unified parcel.[2] Over several years the adjacent properties were developed as condominium projects "in a somewhat piecemeal fashion."[3] "In 1986, the declarant filed and recorded a declaration of condominium," which "provided that the property could be developed in phases and, further, that portions of the property could be withdrawn from the condominium."[4] The declarant utilized this provision of the declaration and assigned its right to withdraw Phases IV and VI to Newport Partners.[5] In 1992,

1. Wellington Condo. Ass'n v. Wellington Cove Condo. Ass'n, 68 A.3d 594, 596 (R.I. 2013).
2. *Id.*
3. *Id.*
4. *Id.* The title of this declaration was "Wellington Yacht & Racquet Club on Newport Harbor – A Condominium."
5. *Id.* "Phase IV consisted of a parcel of land adjacent to Kirwins Fifth Ward Land and the west side of the property's tennis courts. Phase VI was designated for a marina adjacent to Phase IV. The tennis courts [were] part of plaintiff's condominium." *Id.* at n.5.

Newport Partners, as a "successor declarant," withdrew Phases IV and VI.[6] The remaining property after the withdrawal of Phases IV and VI constitutes Plaintiff's premises and the withdrawn parcels are Defendants' premises.[7] This severance is "dispositive of the issues in this appeal."[8]

Following the withdrawal, Phases IV and VI were conveyed to various new owners.[9] "On March 13, 1997, Newport Partners conveyed the withdrawn parcel to Newport Partners LLC," who subsequently created "Wellington on the Cove Condominium."[10] The record disclosed that when Newport Partners withdrew Phases IV and VI, "the claimed right of way consisted of a gravel road which ran across the withdrawn parcel and alongside tennis courts belonging to [P]laintiffs' condominium."[11] The claimed right of way was used by Plaintiffs to access their tennis courts and a point of access to Kirwins Fifth Ward, as its alternative entrance on Harrington Street was blocked by a chain and recently, since 2008, a gate, which was occasionally locked.[12] The right of way was "paved around 1999 or 2000 by the developers of the condominiums on Defendants' premises."[13] In "the summer of 2005, a chain barrier was placed between two poles, positioned at the southern end of the claimed right of way, which impeded access by vehicle and foot traffic."[14] Defendants refused to remove the barrier despite protests by Plaintiffs.[15] A year later, Defendants replaced the chain with "heavy plastic barriers which blocked vehicular traffic, and impeded pedestrian traffic."[16] "[P]laintiffs filed an action against defendant[s] [and] alleg[ed] that, according to the condominium declaration, [P]laintiffs had

6. *Id.* at 596. "Under Article 14, section 14.1 of the declaration—'Reservation of Rights'—one of the rights reserved to the declarant and 'its successors and assigns' is the right 'to withdraw real estate from the Condominium.'" *Id.*
7. *Id.* at 596–97.
8. *Id.* at 597.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* (quotation marks omitted).

an express easement over the right of way."[17] They additionally argued they maintained an "implied or prescriptive easement over the right of way."[18]

In June of 2010, a two-day bench trial commenced.[19] The trial judge found that "[P]laintiffs had failed to prove that the declaration and its amendments reserved an express easement over the claimed right of way," and "'that there [was] no amenity located in, by, along or adjacent to Narragansett Bay which Plaintiffs [were] entitled to access.'"[20] The trial judge then turned to Plaintiffs' claim of an implied easement and reasoned that "when a common owner severs his or her own land and *retains the dominant estate*, [an] implied easement over the servient estate can arise only if the easement is 'absolutely necessary' to the use and enjoyment of the dominant estate."[21] The trial court concluded that "the right of way was not absolutely necessary for [P]laintiffs' use of their properties because they were able to access Kirwins Fifth Ward Land and their tennis courts through the access point on Harrington Street," and final judgment was entered on September 8, 2010 for Defendants.[22] Plaintiffs appealed on several grounds.[23]

ANALYSIS AND HOLDING

The trial justice sat without a jury, and, therefore, the Rhode Island Supreme Court must give "great weight" to his factual findings unless "the record shows that the findings clearly are wrong or the trial justice overlooked or misconceived material evidence."[24] If evidence in the record supports the trial judge's

17. *Id.*
18. *Id.* at 597–98.
19. *Id.* at 598.
20. *Id.* The trial judge found "'that the intent of the [d]eclarant was to provide access to the proposed marina of Phase VI.'" *Id.* (internal citation omitted). Additionally, the trial judge found "'[w]hen the Defendants' [p]remises [were] withdrawn, the Third Amendment did not grant to the Plaintiffs or its members any right to use the proposed marina' and, 'therefore, no right of way was necessary to access any such amenity[.]'" *Id.* (internal citation omitted).
21. *Id.* (emphasis added).
22. *Id.*
23. *Id.*
24. *Id.* (quoting Hernandez v. JS Pallet Co., 41 A.3d 978, 982 (R.I.

findings, the Court "shall not substitute [its] own view of the evidence for [that of the trial justice] even though a contrary conclusion could have been reached."[25]

Additionally, the Court noted that the burden of proof to prove an easement is different from that in a normal civil action, due to the extensive policy considerations "against placing undue burdens upon property."[26]

The Court began its review of the trial justice's decision by examining the text of the declaration that purportedly granted an expressed easement. "Section 14.2 of the declaration state[d] that 'the [d]eclarant will provide reasonable rights of way over and across the real estate withdrawn necessary to provide adequate access to *any amenity located in, by, along or adjacent to Narragansett Bay*.'"[27] Plaintiffs argued that this created an express easement over Defendant's land and "applie[d] to amenities located on [P]laintiffs' property that are located along Narragansett Bay."[28] Plaintiffs charge error to the trial justice and claim he added language to section 14.2 when he concluded "'[w]hen the Defendants' Premises was withdrawn, the Plaintiffs had no right to use any amenity in, by, along or adjacent to Narragansett Bay *located within the [d]efendants' Premises*.'"[29]

Rhode Island law has long held that "'[w]hen construing an instrument that purportedly creates an easement, it is this Court's duty to effectuate the intent of the parties,'" and "'when the written terms of an agreement are clear and unambiguous, they can be interpreted and applied to the undisputed facts as a matter of law.'"[30] Accordingly, oral testimony and extrinsic evidence will not be "received to explain the nature or extent of

2012)).

25. *Id.*

26. *Id.* at 599. "[A]lthough a plaintiff in a civil action normally must meet his burden by only a preponderance of the evidence, the plaintiff must overcome a higher clear and convincing standard to prove an easement." *Id.* (quoting Ondis v. City of Woonsocket ex rel. Treasurer Touzin, 934 A.2d 799, 803 (R.I. 2007)).

27. *Id.* at 600 (emphasis added).

28. *Id.* The "amenities" included the tennis courts. *Id.*

29. *Id.* Plaintiffs contend the trial justice added the highlighted language (internal citation omitted).

30. *Id.* (quoting Hilley v. Lawrence, 972 A.2d 643, 649 (R.I. 2009)).

the right acquired."[31] The Court found the text of the declaration to be clear and unambiguous, but held that it did not extend to the tennis courts or access to Kirwins Fifth Ward Lane because section 14.2 applied only to the marina on Phase VI.[32] The Supreme Court reasoned that the inclusion of "Narragansett Bay" in the purported easement served as a limitation insomuch as it narrowed the scope of the easement to "any such amenity [that is] directly connected to or linked with Narragansett Bay."[33] There was no express easement for the tennis courts as they were not located on Narragansett Bay, and they did not bear any "relationship to Narragansett Bay";[34] therefore, even if considered an "amenity," the tennis courts do not fit within the narrow construction of the easement, and the Supreme Court found no error in the trial justice's finding.[35]

The Court then turned to Plaintiffs' claim of an implied easement.[36] The Court, relying on *Wiesel v. Smira*, noted two different types of implied easements—an implied reservation of an easement and an implied grant of an easement.[37] The trial court justice's synthesis of *Wiesel* yielded that "'when a common owner creates a severance of his own land and retains the dominant portion, he is presumed to reserve whatever rights he needs in the

31. *Id.* at 600.

32. *Id.* The Supreme Court agreed with the trial justice's finding that "'the intent of the [d]eclarant [in] including §14.2 in the First Declaration was to provide access to the proposed marina.'" *Id.*

33. *Id.* at 600–01.

34. *Id.* at 600.

35. *Id.* at 600–01. The trial judge "properly focused his analysis on the precise language of Section 14.2 and the specific easement rights that were reserved—those relating to the marina."

36. *Id.* at 601.

37. *Id.; see* Wiesel v. Smira, 49 R.I. 246, 253 (1928).

> [T]he distinction is based upon the theory that the common owner's deed of a portion of his land conveys all essential rights which he has, and that whatever is apparent and continuously necessary to the beneficial use and enjoyment of the granted property is intended to be conveyed so far as the grantor could do so. From this it is clear that where the owner creates a severance by sale of the servient portion of his premises[,] no implication of intention to reserve any rights to himself as owner of the quasi dominant estate ought to be made unless such rights are absolutely necessary to the use of the property reserved.

Wiesel, 49 R.I. at 249.

servient portion of the real estate.'"[38] The trial justice found "an implied easement can only arise in such a situation if the rights in the servient estate are absolutely necessary to the dominant estate," and concluded that the declarant, Plaintiffs and the original condominium association, did not reserve an easement for its premises when the parcel was severed.[39] After this finding, the trial justice analyzed the facts "under the framework of an implied easement by reservation, which triggers the more exacting standard that the use of the easement be 'absolutely necessary.'"[40]

The Court began its review of the trial justice's determination of an implied easement by determining which party "was the common owner of the property vested with the right to reserve an easement unto itself."[41] The preamble stated the declarant was the "owner in fee simple" of the entire parcel and reserved the right to withdraw parcels of real estate in section 14.2.[42] Thus, Newport Partners, as successor declarant, was assigned the same rights as the declarant and "stepped into the shoes of the declarant."[43] Accordingly, "it was the declarant that withdrew the real estate and not [P]laintiffs."[44] Therefore, the Court found the trial justice's conclusion to be erroneous as the trial justice "conflated the estates that were retained by the declarant and the portion that comprised [P]laintiffs' premises."[45] The Court held that the trial justice misapplied the proper analysis because it "rest[ed] on the erroneous conclusion that Plaintiffs conveyed a portion of land without expressly reserving a right of way for their use,"[46] when, in fact, it was the declarant who "withdrew and retained a portion of the premises—the servient estate—for its own commercial purposes, thereby in effect transferring the

38. *Wellington Condo. Ass'n*, 68 A.3d at 601.
39. *Id.*
40. *Id.* at 601–02 (citing *Wiesel*, 49 R.I. at 249).
41. *Id.* at 602. The court noted that the basic tenants of property law do not "coalesce easily with complex modern real estate transactions and the law of condominium development and ownership." *Id.* Additionally, the court noted that "[t]he law of implied easements may not be well-suited to the facts of this complex case." *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 601.
46. *Id.* at 602.

dominant estate to [P]laintiffs."[47] Consequently, as Plaintiffs did not convey anything and could not "be deemed to be grantors or characterized as [] common owner[s] who convey[ed] a portion of [their] estate,"[48] they could not have created an implied easement by reservation.

The Court found that the property was severed by a common owner and a portion was retained for further development; therefore, the facts must be analyzed under an implied easement by grant.[49] A claim for implied easement by grant must be "(1) apparent, (2) permanent, and (3) reasonably necessary for the enjoyment of the claimant's parcel prior to severance."[50] The trial justice did not make any findings as to an easement by grant, and the record did not hold sufficient facts to make this determination.[51] Therefore, the decision of the trial justice, with respect to the implied easement, was vacated and remanded for "further evidence and fact-finding to ascertain whether the Plaintiffs have an implied easement by grant over the claimed right of way."[52]

Plaintiffs' appeal was "sustained in part and denied in part."[53] The trial justice's finding of an express easement was affirmed, and the determination of the claim of an implied easement was vacated and remanded.[54]

COMMENTARY

While the trial justice and Court applied the correct applicable law and arrived at the correct logical conclusion, easement law is archaic, outdated, problematic, overbroad, complex, and merely a burden to current real estate transactions and development.[55] Easements are too easy to create and are

47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.* at 603.
52. *Id.*
53. *Id.*
54. *Id.*
55. Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1261 (1981-1982). "The law of easements . . . is the most complex and archaic body of American property law remaining in the twentieth century." *Id.*

sometimes created inadvertently; however, existing easements are very difficult to dispose of, especially considering the high costs of litigation. Easements plague properties with nearly irreversible burdens that disrupt sales, divisions and developments of properties and potentially decrease the property's market value—all interests which are fundamental to property ownership.

As seen in the present case, implied easements are not only a fall back to a failed argument of an express easement, but courts may grant an implied easement and implicate the property despite lack of intent to do so. Implied easements not only burden the current landowner, but inhibit prospective purchasers of the land. Implied easements are often difficult to discover, and their use may be unnoticed during an inspection of the property. Even if noticed, the scope, extent, and duration of the easement may be impossible to ascertain. Why put such an important property right at stake? Why allow implied easements at all? A property owner is giving up one of his "sticks" in the property bundle; why allow that to be decided by implication? There is nothing more valuable to a property owner than his fundamental property rights—including excluding others from his property—and implied easements unduly and unnecessarily challenge this right.

Moreover, implied easements of grant and reservation should be abolished. The policy and purpose of implied easements by grant and reservation can be found in other easement categories—express easements, easements of necessity and easements for an intended use.[56] These latter easements should be construed and only enforced in a narrow way.

Easement law needs consideration and reform. The simplification and modernization of the law will eliminate the outdated complexities that inherently coincide with easements.[57] In fact, England, from which the United States derived its fundamental property law and principles, has recognized easements' shortcomings, and recently, called for simplification and reform of servitude law.[58]

56. Law Commission Report No. 327, *Making Land Work: Easements, Covenants, and Profits à Prendre* (Jun. 7 2011), *available at* http://lawcommissionjustice.gov.uk/docs/lc327_easements_report.pdf.

57. French, *supra* n.55 at 1265.

58. *See* JAMES A. NORMINGTON, *Rethinking Easements and Restrictive Covenants*, 15 IBA REAL EST. 43 (2011); *see also* Law Commission Report No.

The Court's affirmation of the trial court's finding is supported by case law. However, this case law is outdated. This case may be the last of its kind if its call for modernizing the easement law is recognized and accepted by the legislature. As times change, so do laws, and easement law has been left behind and alleged servient estate property owners are suffering for it.

CONCLUSION

The Rhode Island Supreme Court affirmed the trial justice's decision concerning the claim of an express easement. However, the Court vacated and remanded the trial justice's determination of an implied easement by reservation due to a lack of fact-finding to determine whether the requirements of an implied easement by reservation had been satisfied.

Christopher J. Fragomeni

327, *supra* n.56.

Tort Law. *Oden v. Schwartz*, 71 A.3d 438 (R.I. 2013). The Rhode Island Supreme Court affirmed a judgment entered against an echocardiologist in a medical malpractice action, holding the following: (1) the defendant did not put forth sufficient evidence to warrant an instruction on intervening and superseding cause, (2) testimony showing the plaintiff suffered cardiac arrest soon after his second surgery was admissible as there was evidence establishing a causal nexus between this injury and the defendant's breach, (3) the trial justice was not clearly erroneous in concluding the damages award was not excessive, (4) the trial justice's *sua sponte* instruction prohibiting jurors from considering the parties' insurance coverage was proper, and (5) the statute imposing a mandatory twelve percent prejudgment interest rate in medical malpractice actions was constitutional.

FACTS AND TRAVEL

On January 26, 2004, forty-nine year old plaintiff Paul Oden underwent open-heart mitral valve replacement surgery at Rhode Island Hospital.[1] Heart surgeon Arun K. Singh, M.D. performed this surgery with the assistance of defendant Carl Schwartz, M.D., an echocardiologist at Rhode Island Hospital.[2] Neither Dr. Singh nor Dr. Schwartz documented any surgical complications.[3] Approximately three months later, however, Mr. Oden's cardiologist diagnosed him with severe aortic insufficiency ("A.I.") allegedly caused by Dr. Singh mistakenly suturing his aortic valve during the January 2004 mitral valve replacement.[4] As a result, Mr. Oden required an aortic valve replacement in August 2004, immediately after which he suffered cardiac arrest.[5]

Mr. Oden brought medical malpractice actions in Providence County Superior Court against Rhode Island Hospital, Dr. Singh, and Dr. Schwartz, but settled his claims against Rhode Island Hospital and Dr. Singh.[6] Thus, only the action against Dr.

1. Oden v. Schwartz, 71 A.3d 438, 441 (R.I. 2013).
2. *Id.*
3. *Id.* at 443–44.
4. *Id.* at 441.
5. *Id.*
6. *Id.* at 441–42.

Schwartz went to a jury trial and is the subject of this case.[7]

A. *Summary of the Testimony*

At trial, Mr. Oden called two expert witnesses and Dr. Singh to testify on his behalf.[8] Mr. Oden and his wife Linda also testified.[9] Dr. Singh testified that he mistakenly stitched Mr. Oden's aortic valve causing the A.I., but said he was not aware of the problem at the time of the surgery.[10] He explained that he was unable to see behind the mitral valve while working on it and relied on his surgical team, his echocardiologist in particular, to identify such a problem.[11] Dr. Singh's testimony was somewhat inconsistent as to whether Dr. Schwartz informed him of the A.I. after the surgery.[12] Mr. Oden's expert witnesses testified that regardless of whether Dr. Schwartz reported the A.I. to Dr. Singh, Dr. Schwartz deviated from the standard of care by "fail[ing] to conduct a detailed study of the aortic valve" following the first surgery, as well as by failing to document the A.I. in Mr. Oden's medical record.[13] In addition, one of the experts testified that Mr. Oden would not have required a second surgery if the injured aortic valve was properly addressed at the first surgery.[14] The second surgery, Mr. Oden testified, made it difficult for him to "get on with his life," and knowing he would need a third "ma[de] [him] sad and affect[ed] his mood."[15] In regards to the the cardiac arrest he suffered following his second surgery, Mr. Oden described being cardioverted as "the wors[t] pain [he] ever felt."[16]

Likewise, Dr. Schwartz testified on his own behalf and also called an expert witness.[17] Dr. Schwartz testified "that it was his

7. *Id.* at 442.
8. *Id.* Mr Oden's expert witnesses were Stuart Pett, M.D., a heart surgeon, and Justin D. Pearlman, M.D., an expert in the field of echocardiography. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 443.
12. *Id.*
13. *Id.* at 446.
14. *Id.*
15. *Id.* (internal quotation marks omitted).
16. *Id.* (internal quotation marks omitted).
17. *Id.* Dr. Schwartz's expert witness was Adam B. Lerner, M.D., the director of the cardiac anesthesia division at Beth Israel Deaconess Medical

'best recollection' that he advised Dr. Singh of the A.I. at the conclusion of the mitral valve replacement. He admitted that he failed to document the A.I.," and "acknowledged that, in this case, he 'did not do a totally detailed exam' of the aortic valve."[18] He believed, however, that the standard of care did not require him to obtain further information without Dr. Singh's instruction, as the surgical team "must defer to the surgeon's decisions in this regard."[19] Dr. Schwartz also testified that Dr. Singh was not concerned about Mr. Oden's A.I. upon learning of it, thus decided to take him off bypass.[20] Dr. Schwartz's expert testified that, in his opinion, Dr. Schwartz's failure to document the A.I. in the medical record did not meet the standard of care.[21] On the other hand, he testified that Dr. Schwartz did meet the standard of care by identifying the A.I. and alerting Dr. Singh to it.[22] He acknowledged, however, that his opinion was based on accepting Dr. Schwartz's testimony as true.[23]

B. *Jury Charge and Jury Verdict*

Despite Dr. Schwartz's requests to the contrary, the trial justice's closing instructions to the jury did not include an instruction on intervening and superseding cause and did include an instruction prohibiting the jurors from speculating about the parties' insurance coverage.[24] Dr. Schwartz objected to both aspects of these instructions and argued that it was improper for the trial justice to inject the issue of insurance into the case.[25] In response, the trial justice explained that she "deemed it important to tell jurors that they mustn't consider insurance as a factor in deciding the merits of the case" because "there was so much media coverage on this subject."[26] In addition, she pointed out that since "everyone has insurance," she had not "raised anything that the

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Center in Boston. *Id.*

18. *Id.* at 444.
19. *Id.*
20. *Id.*
21. *Id.* at 446.
22. *Id.*
23. *Id.*
24. *Id.* at 447.
25. *Id.*
26. *Id.* (internal quotation marks omitted).

jurors [did not] know about."[27]

"Before the jury retired to deliberate, Dr. Schwartz moved for judgment as a matter of law under Rule 50(a)(1) of the Superior Court Rules of Civil Procedure. The trial justice deferred her ruling on that motion until the jury reached its verdict."[28] "[T]he jury returned a $1.5 million-dollar verdict in [Mr.] Oden's favor," finding "that Dr. Schwartz was 25 percent responsible for [Mr.] Oden's injuries and that Dr. Singh was 75 percent responsible for those injuries. Thus, Dr. Schwartz was deemed responsible for $375,000 of those damages, plus costs and statutory interest."[29]

C. *Post-Trial Motions*

After the verdict was announced, the trial justice denied Dr. Schwartz's motion for judgment as a matter of law.[30] After final judgment and statutory interest were entered for Mr. Oden in the amounts of $375,000 and $170,260.27, respectively, the trial justice also awarded costs in favor of Mr. Oden in the amount of $4,416.50.[31] Dr. Schwartz then moved for a new trial under Rule 59(a) of the Superior Court Rules of Civil Procedure.[32] He also moved to vacate, alter, or amend the judgment under Rule 59(e), and asked for a remittitur, contending the evidence did not support the damages awarded.[33]

In ruling on these motions, "the trial justice independently reviewed and summarized the trial testimony."[34] She explicitly found Mr. Oden and his expert witnesses to be credible, but found that Dr. Singh and Dr. Schwartz were not credible.[35] While she did not make a specific finding as to the credibility of Dr. Schwartz's expert, she noted that his testimony "assumed Dr. Schwartz was telling the truth."[36] Concluding "reasonable minds could have reached differing results with this evidence," the trial

27. *Id.* (internal quotation marks omitted).
28. *Id.* (internal footnote omitted).
29. *Id.* at 447–48.
30. *Id.* at 448.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.* at 449 (internal quotation marks omitted).

justice denied Dr. Schwartz's Rule 59 motions.[37]

ANALYSIS AND HOLDING

Dr. Schwartz raised five arguments on appeal.[38] First, he argued the trial justice should have instructed the jury on intervening and superseding cause.[39] Second, he argued the trial justice should not have admitted evidence concerning the cardiac arrest Mr. Oden suffered following his second surgery.[40] Third, he argued the trial justice erred in concluding the damages award was not excessive.[41] Fourth, he argued the trial justice should not have *sua sponte* instructed the jury on the issue of liability insurance.[42] Finally, he argued that a Rhode Island statute imposing a mandatory twelve percent prejudgment interest rate in medical malpractice actions was unconstitutional as it would deprive litigants of substantive and procedural due process.[43] The Court addressed each of these issues in turn.[44]

A. *Instruction on Intervening and Superseding Cause*

Dr. Schwartz argued that the trial justice erred in failing to instruct the jury on intervening and superseding causes, contending that Dr. Singh's failure to evaluate the aortic valve when notified of the A.I. constituted an independent intervening force sufficient to break the causal connection between his own alleged failure to obtain sufficiently detailed echocardiographical views of the aortic valve and Mr. Oden's harm.[45] Reviewing the issue *de novo,*[46] the Court held that such an instruction would have been improper.[47] In so holding, the Court emphasized that

37. *Id.* at 450 (internal quotation marks omitted).
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. The Rhode Island Supreme Court reviews "issues pertaining to jury instructions" *de novo*. *Id.* (citation omitted) (internal quotation marks omitted).
47. *Id.*

Dr. Schwartz had the burden of proof on this affirmative defense, and that he failed to introduce sufficient evidence to meet that burden.[48] Further, the Court defined an intervening cause as one that "exists when an independent and unforeseeable intervening or secondary act of negligence occurs, after the alleged tortfeasor's negligence, and that secondary act becomes the sole proximate cause of the plaintiff's injuries."[49] The Court largely adopted the trial justice's reasoning in determining that Dr. Singh's negligence did not fall within this definition because it was not independent of Dr. Schwartz's negligence.[50] Rather, the Court concluded that the two doctors, operating as part of a surgical team, had "roles and responsibilities [that] were inextricably intertwined" and that "if anything, this [was] a situation in which one physician's duty include[d] guarding against the mistakes of another, even if those mistakes may [have been] the result of negligence."[51]

B. *Admission of Testimony Pertaining to Oden's Post-Operative Cardiac Arrest*

Next, Dr. Schwartz argued "there was no testimony from any witness competent to opine that Mr. Oden's post-operative cardiac arrest in August of 2004 [was related to] * * * any act or omission on [his part] in connection with the surgery in January of 2004," that instead the cardiac arrest was likely caused by Mr. Oden's nicotine and alcohol use, and that the trial justice thus erred in allowing testimony concerning the cardiac arrest.[52] The Court disagreed and concluded that Mr. Oden's expert's testimony was sufficient "to suggest that a causal relationship existed between the cardiac arrest and Dr. Schwartz's negligence at the first surgery, such that the admission of testimony concerning the cardiac arrest was proper."[53] In addition, though the Court found Dr. Schwartz's argument concerning Mr. Oden's alcohol and nicotine use to be unconvincing, it noted the jury had been allowed

48. *Id.*
49. *Id.* at 450–51 (citation omitted) (internal quotation marks omitted).
50. *Id.* at 451.
51. *Id.* (citation omitted) (internal quotation marks omitted).
52. *Id.*at 452 (internal quotation marks omitted).
53. *Id.*

to hear and weigh that argument.[54]

C. *Denial of Defendant's Request as to the Damage Award*

Dr. Schwartz further contended that the jury verdict was excessive as it was "against the fair weight of the evidence" and was improperly based on sympathy evoked by Mr. Oden's "frail and weak" condition on the witness stand due to his unrelated stroke.[55] Accordingly, he argued that the trial justice erred in denying his request for remittitur as well as his motion to vacate, alter, or amend the damage award.[56] Applying a *clearly erroneous* standard of review, the Court noted that the trial judge "aptly performed her role in assessing the credibility of witnesses, weighing the evidence, and evaluating the propriety of the damage award," and held that she did not err in "conclud[ing] that the damages award was satisfactory and that the verdict [did] not shock the conscience."[57]

D. *Insurance Instruction*

Dr. Schwartz next argued that the trial justice's *sua sponte* jury instruction on insurance violated Rule 411 of the Rhode Island Rules of Evidence.[58] Reviewing the instruction *de novo*, the Court considered whether the instruction, though not technically evidence, violated the spirit of the rule; the Court concluded it did not.[59] First, the Court recognized that "the overall concept of liability insurance may have pervaded the minds of the jurors in this case," as it is "a wholly familiar concept—from mandatory motor vehicle insurance coverage to the vigorous nationwide debate concerning medical insurance and

54. *Id.*
55. *Id.* at 452–53.
56. *Id.* at 452.
57. *Id.* at 453 (internal quotation marks omitted).
58. *Id.* at 454. "In pertinent part, Rule 411 states: '[e]vidence that a person was or was not insured against liability is not admissible upon the issue whether he acted negligently or otherwise wrongfully.' However, such evidence may be allowed 'when offered for another purpose, such as proof of agency, ownership, or control, bias or prejudice of witness, or when the court determines that in the interests of justice evidence of insurance or lack of insurance should be permitted.'" *Id.* (citation omitted).
59. *Id.*

medical liability."[60] Thus, the trial justice's instruction likely did not awaken jurors to anything of which they were previously unaware.[61] Further, the Court cited the Advisory Committee's Note to Rule 411, which "declares that '[t]he Rhode Island approach tempers the rule excluding evidence of liability insurance with a realistic view of contemporary society that recognizes the ubiquitous presence of insurance.'"[62] In this regard, the Court concluded that the trial justices' instruction "directly square[d] with the spirit of Rule 411" by "prohibit[ing] the jury from speculating about insurance coverage in its deliberations."[63] Finally, the Court noted that the instruction on insurance coverage likely did not prejudice the jurors as it occupied only thirty seconds of the two-hour-long jury instructions.[64] For these reasons, the Court determined that this instruction was proper.[65]

E. *The Constitutionality of §9-21-10(b)*

Lastly, Dr. Schwartz challenged the constitutionality of Rhode Island General Laws § 9-21-10(b) under the due process clause of the United States and Rhode Island Constitutions.[66] He argued that by imposing a mandatory twelve percent prejudgment interest rate in, the statute infringed on a defendant's fundamental right to a jury trial, thereby depriving that defendant of substantive due process.[67] Dr. Schwartz rested this

60. *Id.* at 455.
61. *Id.*
62. *Id.*
63. *Id.* The court advised: "the trial justice might more appropriately have refrained from using the phrase 'a physician's insurance premiums' in her instruction," but determined that this phrase did not render the jurors "incapable of arriving at a fair and impartial verdict." *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 456. "Section 9–21–10(b) states in pertinent part: 'In * * * medical malpractice actions in which a verdict is rendered or a decision made for pecuniary damages, there shall be added by the clerk of the court to the amount of damages interest at the rate of twelve percent (12%) per annum thereon from the date of written notice of the claim by the claimant or his or her representative to the malpractice liability insurer, or to the medical or dental health care provider or the filing of the civil action, whichever first occurs.'" *Id.*

argument on the contention that "a defendant, facing the looming threat of obtaining an unfavorable judgment with the inclusion of prejudgment interest, [would] opt to settle rather than assert his or her right to a trial by jury," and that the statute operated to punish those who did opt to assert that right.[68] Contending that a jury trial constituted a fundamental right, Dr. Schwartz argued the statute needed to survive a strict scrutiny.[69] Dr. Schwartz further argued that the "process in which the clerk of the court uniformly adds such interest deprives a defendant of his or her property without an opportunity to be heard," thereby depriving the defendant of procedural due process.[70]

In addressing these arguments, the Court stated that it would not hold a statute unconstitutional unless the party challenging its constitutionality "prove[d] beyond a reasonable doubt that the act violate[d] a specific provision of the Rhode Island Constitution or the United States Constitution."[71] In addition, the Court determined that the prejudgment interest statute constituted economic legislation that did not implicate a fundamental right.[72] As such, the Court examined the statute using a rational basis standard of review, under which "the statute [would] be upheld 'if there [was] any reasonably conceivable state of facts that could provide a rational basis' for the [twelve] percent prejudgment interest rate in medical malpractice actions."[73] The Court concluded that the statute served two purposes, compensating plaintiffs for delay and encouraging early settlement of claims, and thus held that it passed a rational basis review.[74] Likewise, the Court determined that "[t]he fact that the prejudgment interest award [was] uniform, not discretionary," did not deprive a defendant of procedural due process because it "[was] both an expedient and efficient use of judicial resources."[75] For these reasons, the Court held that §9-21-10(b) was constitutional.[76]

68. *Id.*
69. *Id.* at 457.
70. *Id.*
71. *Id.* at 456 (internal quotation marks omitted).
72. *Id.* at 457.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*

COMMENTARY

Though this case presented the Court with several issues, this Commentary will focus on just one: whether Rhode Island's twelve percent prejudgment interest rate violates defendants' constitutional rights. As the Court resolved this issue quite straightforwardly, despite it being an issue of first impression, this Commentary will offer a more in-depth discussion of the arguments on either side of the debate.

Prejudgment interest is generally understood to serve two purposes. First, by compensating plaintiffs for the inability to use money they were entitled to use, prejudgment interest puts plaintiffs in the position they would have been in had a judgment been paid immediately.[77] Second, prejudgment interest provides defendants with an incentive to resolve disputes efficiently, for example by settling.[78] In the case at hand, the Court deferred to these two purposes in holding that Rhode Island's legislature had a rational basis for imposing a mandatory twelve percent prejudgment interest rate.[79]

In theory, however, these purposes are served when the interest is at or near the market rate.[80] As the market rate is currently quite low, and as Rhode Island's twelve percent prejudgment interest rate is among the highest in the United States, the question becomes whether it really serves these purposes.[81] For example, it could be argued that Rhode Island is overcompensating plaintiffs to whatever degree a twelve percent prejudgment interest rate exceeds that which is truly necessary to

77. For example, plaintiffs could invest and collect interest on their judgments once paid; likewise, plaintiffs might need to borrow money at interest until a judgment is paid. Michael S. Knoll, *A Primer on Prejudgment Interest*, 75 TEX. L. REV. 293, 294–02 (1996).

78. *Id.*

79. *Oden,* 71 A.3d at 457.

80. *Knoll* uses the term "market rate" to make this point. Knoll, *supra* note 77, at 297. It should be noted, however, that prejudgment interest rates are frequently compared to the "prime rate," or base institutional lending rate. For the purposes of this discussion, I use the term "market rate" to include a broader range of interest rates at which the plaintiff and defendant might, respectively, borrow or lend the money at stake in the action.

81. *See* Brandon Gee, *Defense Bar: Interest Rate on Verdicts Unreasonable*, MASS. LAWYERS WEEKLY, (July 1, 2013), http://masslawyersweekly.com/2013/07/03/defense-bar-interest-rate-on-verdicts-unreasonable/.

compensate them. The marginal difference between a truly compensatory prejudgment interest rate and an overly compensatory prejudgment interest rate might not, then, be rationally related to the purpose the interest rate is intended to serve, in which case the rate might indeed violate due process. The Court seemingly dodged this possibility, however, by applying a low level of scrutiny and using double-negatives, concluding that it "*[could not] say* that, even in today's economy, [twelve] percent *[was] not a reasonable* measure of the loss sustained through delay in payment."[82]

Yet, even if the court approached its analysis with a higher level of scrutiny, the result would likely be the same. First, Rhode Island's prejudgment interest rate can certainly be defended as rationally related to the goal of compensating plaintiffs for delay. The Rhode Island Association for Justice's amicus brief, quoting the trial justice, set forth such a defense:

> Although institutional lending rates are quite low right now, that fact alone does not render the rate of 12 percent irrational or unrelated to an important legislative purpose. One or two percentage points over the prime rate is generally reserved for a bank's best corporate customers. For the average person or small business, rates are higher. Home loans are between four and six percent, second home and automobile loans are around seven to eight, or even nine. Vendors and suppliers add 18 to 21 percent to their invoices. Retailers and revolving credit companies charge 21 to 29 percent. Currently, 12 percent is pretty much in the middle and, as such, it provides compensation and serves as an incentive . . . assessing interest at the prime rate would do little, if anything, to promote early and fair settlements. In fact, it would serve as a disincentive. Banking and other institutions such as insurance carriers can achieve a higher rate of return if they keep their money instead of settling . . . The statute, at its statutory rate of 12 percent, is rationally related to all of its purposes.[83]

82. *See Oden,* 71 A.3d at 456 (emphasis added) (citations omitted).

83. Brief for Paul Oden and Linda Oden as Amicus Curiae Rhode Island Association for Justices Supporting Appellees and the Constitutionality of

Second, it seems Rhode Island's true goal is to encourage settlement, and by erring on the higher end of the interest-rate spectrum, Rhode Island seems to be targeting large, institutional defendants that would lack incentive to settle if the prejudgment interest rate were closer to market value. In that regard, any difference between a truly compensatory prejudgment interest rate and an overly compensatory prejudgment interest rate would be rationally justified by Rhode Island's interest in protecting its consumers and small businesses from large institutions with ample resources to litigate. Thus, although the Court did not articulate this line of reasoning in such depth, it was correct in holding that Rhode Island's legislature had a rational basis for imposing a mandatory twelve percent prejudgment interest rate.

CONCLUSION

In summary, the Rhode Island Supreme Court addressed five distinct issues in this case. First, it held that there was insufficient evidence to warrant an instruction on intervening and superseding cause. Second, the Court held that testimony showing the plaintiff suffered cardiac arrest soon after his second surgery was admissible where there was evidence establishing a causal nexus between this injury and the defendant's breach. Third, the Court held that the trial justice was not clearly erroneous in concluding the damages award was not excessive. Fourth, acknowledging that the concept of insurance coverage is a matter of common knowledge, the Court held that the trial justice's *sua sponte* instruction prohibiting jurors from considering the parties' insurance coverage was proper and did not violate the spirit of Rule 411 of the Rhode Island Rules of Evidence. Finally, the court held that §9-21-10(b) was constitutional as it was rationally related to Rhode Island's goals of compensating plaintiffs and encouraging settlement.

Mackenzie Flynn

R.I. GEN. LAWS §9-21-10 at 7, *Oden v. Schwartz,* 71 A.3d 438 (R.I. 2013) (No. SU-11-0167) (citation omitted).

Tort Law. *Vasquez v. Sportsman's Inn, Inc.*, 57 A.3d 313 (R.I. 2012). The Rhode Island Supreme Court vacated a preliminary injunction preventing a bar and a related corporation from selling property upon a finding that a customer had not established a prima facie case that the bar owed him a duty of care when he was shot and seriously injured outside the bar.

FACTS AND TRAVEL

Gilberto Vasquez ("Vasquez") sued the Sportsman's Inn and DLM, Inc. ("DLM") for failure to provide sufficient security on the premises after an unknown individual shot him outside the bar in the early morning hours of November 12, 2006.[1] The Sportsman's Inn was the subsidiary of DLM, and DLM's only source of income was the rent the Sportsman's Inn paid to it.[2] When Vasquez learned that DLM listed the Sportsman's Inn property for sale, he filed a motion for a preliminary injunction with the trial court as the property value was the largest asset among the defendant businesses.[3] The trial judge granted the preliminary injunction after finding that Vasquez would likely prevail on arguing that the Sportsman's Inn breached the duty of care it owed him and that piercing the corporate veil was appropriate.[4] The defendants subsequently appealed the trial judge's decision.

During the preliminary injunction hearing, the president of the Sportsman's Inn testified that security personnel worked inside, not outside, of the bar and used a metal detecting wand to prevent individuals from bringing weapons into the bar.[5] He further testified that on the night Vasquez was shot, only one security personnel out of the usual three was working.[6] Vasquez also testified at the hearing and stated that after leaving the bar, he "remembers . . . hearing a gunshot, falling to the ground, and waking up in a hospital."[7] Additionally, Vasquez testified he

1. Vasquez v. Sportsman's Inn, Inc., 57 A.3d 313, 315, 317 (R.I. 2012).
2. *Id.* at 316.
3. *Id.* at 315.
4. *Id.* at 317.
5. *Id.* at 316.
6. *Id.*
7. *Id.* at 315.

consumed about five alcoholic drinks while at the bar and took ecstasy earlier in the day.[8] The Court noted that Vasquez did not testify about his interactions, specifically "arguments or altercations" while at the bar that evening.[9] A Providence Fire Department first responder testified that Vasquez was "found on the ground . . . outside of the doors in close proximity to the club" but he could not recall specifically where Vasquez was.[10]

ANALYSIS AND HOLDING

The Rhode Island Supreme Court held that proximity to the bar door was not enough to establish that the defendants owed Vasquez a duty of reasonable care.[11] The standard of review for preliminary injunctions is whether the trial judge made an abuse of discretion, which is very deferential to a trial judge's decision. The Court only needs to find four factors to determine that the trial judge made a valid decision in issuing a preliminary injunction: (1) that the moving party needs to show "a reasonable likelihood of success on the merits"; (2) that the moving party "will suffer irreparable harm without the requested injunctive relief"; (3) that the moving party must be the party favored by a "balance of the equities"; and (4) that the "injunction will preserve the status quo."[12] Here, the Court found that the first factor of the test was wrongly decided and had no reason to analyze the other factors.

Regarding the first factor, the Court held Vasquez could not establish "a reasonable likelihood of success on the merits of his underlying negligence claim."[13] The general presumption is landowners do not owe a duty of care to others from harm caused by a third party unless the landowner has a special relationship with the other person.[14] Bars do have a special relationship with their patrons, and thus owe a duty of care to their patrons due to the nature of the alcoholic beverages they serve.[15] This duty,

8. *Id.* at 314–15.
9. *Id.* at 317.
10. *Id.* at 317.
11. *Id.* at 320.
12. *Id.* at 318.
13. *Id.* at 321.
14. *Id.* at 319.
15. *Id.*

however, is qualified to "incidents occur[ing] in the proximity of a particular establishment '*and had their origins within*.'"[16] Here, the lack of testimony establishing an explanation for why Vasquez was shot and that some preceding incident was within the Sportsman's Inn control failed to show that this incident had its origin within the Sportsman's Inn and was detrimental to establishing a prima facie case of breach of duty. The Court noted one mention that Vasquez had argued with another customer at the bar in the record, but the evidence was scant and not mentioned at all during the injunction hearings.[17] Accordingly, the Court was cautious not to impose liability on a business where the injury might be unforeseen and not preventable.[18] Dissenting Justices Goldberg and Indeglia argued that because neither party significantly raised the negligence finding on appeal, the Court should have focused on the parties' primary issue of piercing the corporate veil.[19]

COMMENTARY

The majority was right to address the negligence issue even if the parties were primarily focused on appealing the decision to pierce the corporate veil because not addressing the negligence issue would have created a much easier standard for establishing negligence for purposes of a preliminary injunction. The specific facts regarding the plaintiff's illicit drug use earlier in the day, the lack of specific facts about his exact proximity to the bar entrance, and the lack of testimony about his conduct and interactions at the bar likely led the Court to believe this would be too easy of a standard for a "reasonably high likelihood of success on the merits" and would impose an unfair burden on a business if it was enjoined from certain financial activities but then ultimately won its case. If not for these facts (or, lack thereof), it certainly would have been possible for the Court to affirm the trial judge's decision that the defendants had likely breached a duty of care. The Court noted the Sportsman's Inn was not an infrequent site of police

16. *Id.* (emphasis in original).
17. *Id.* at 320 n.12.
18. *Id.* at 320.
19. *Id.* at 321–22 (Golderberg, J. & Indeglia J., dissenting).

reports.[20] Common sense would suggest that the origins of a shooting for anyone leaving a bar are likely to be within that bar. The parties' lack of focus on the negligence issue, which the dissent points out, also suggests that the parties themselves may have found the finding of negligence reasonable.[21] In hearing appeals, the Court should not focus on the issue the parties have primarily raised to the neglect of other issues that could have major impacts on other areas of the law in future cases.

CONCLUSION

The Rhode Island Supreme Court vacated Vasquez's preliminary injunction to prevent the sale of the Sportsman's Inn because the Court held Vasquez could not establish "a reasonable likelihood of success on the merits of his underlying negligence claim."

Lena Thomas

20. *Id.* at 315. In a span of less than eleven years, the police were called to the Sportsman's Inn 667 times. *Id.* at n.3.

21. *Id.* at 321–22.

Wills and Trusts Law. *Swain v. Estate of Tyre Ex Rel. Reilly*, 57 A.3d 283 (R.I. 2012). The Rhode Island Slayer's Act, R.I. Gen. Laws § 33-1.1, prohibits the stepchildren of a decedent from recovering as contingent beneficiaries from the decedent's estate when the stepchildren's father is the slayer of the decedent under the Act. Such recovery would benefit the slayer, which is prohibited by the Act**.**

FACTS AND TRAVEL

On October 5, 1993, Shelley Arden Tyre ("Shelley") executed a will, naming her soon to be husband, David Swain ("David"), "as the sole beneficiary of her estate" and his two children, Jennifer and Jeremy Swain, the plaintiffs, "as the only contingent beneficiaries," named in the event David died within thirty days after Shelley's death.[1] Shortly thereafter, Shelley and David were married.[2] On March 12, 1999, "Shelley died while scuba diving with David," and, thereafter, "David was named as the executor" of her will.[3] Shelley's parents, however, brought a wrongful death claim against David alleging that he was a slayer who caused Shelley's wrongful death and that he "should be subject to civil liability for a criminal act."[4] On July 3, 2002, Shelley's parents successfully petitioned the Jamestown Probate Court to remove David as executor and replace him with James H. Reilly (Reilly).[5] In February of 2006, a trial was held to establish David's liability on all three counts alleged by Shelley's parents, and it was determined that David was a slayer pursuant to the Act.[6]

On June 27, 2008, in response to a petition filed by Reilly, the Jamestown Probate Court issued a written order precluding Jennifer and Jeremy from "inheriting under Shelley's will."[7]

1. Swain v. Estate of Tyre *ex rel.* Reilly, 57 A.3d 283, 285-86 & n.4 (R.I. 2012).
2. *Id.* at 285–86.
3. *Id.* at 286 n.5.
4. *Id.* at 286; "Section 33-1.1-1(3) states that a slayer is 'any person who willfully and unlawfully takes or procures to be taken the life of another.'" *Id.* at n.8 (citing R.I. GEN. LAWS § 33-1.1-1(3) (1956)).
5. *Id.* at 286.
6. *Id.*; Shelley's parents were awarded $2,815,085.46 in compensatory damages and $2 million in punitive damages. In response, David motioned for a new trial, which was denied and also appealed to the Supreme Court, but the trial court's ruling was affirmed. *Id.*
7. *Id.* at 286–87; "The probate judge issued a written order declaring

Jennifer and Jeremy appealed this order to the Newport County Superior Court on the basis that, as they were named as beneficiaries in Shelley's will, they "were not inheriting 'through' their father" and, so, were not barred from their inheritance by The Rhode Island Slayer's Act, R.I. Gen. Laws § 33-1.1 ("the Act").[8] Shelley's Estate, however, argued that the language of the Act, stating "[n]either the slayer nor any person claiming through him . . . shall . . . receive any benefit as the result of the death of the decedent," should be interpreted broadly with "'discretion to determine when a slayer will benefit by either taking directly or indirectly,'" which would bar Jennifer and Jeremy from the inheritance as their inheritance would benefit David.[9] "On cross-motions for summary judgment, the hearing justice found in favor of the Estate," holding that, because "Jeremy had personally contributed and raised money to finance [David's] defense" and "Jennifer and Jeremy had both stated that they would use . . . [their inheritance] for their father's criminal defense, if necessary," Jennifer and Jeremy were barred from the inheritance by the Act as the Act prohibits a slayer, here David, from profiting "from his wrongdoing."[10] Thereafter, Jennifer and Jeremy appealed to the Rhode Island Supreme Court.[11]

ANALYSIS AND HOLDING

Upon review of the trial justice's grant of summary judgment, the Supreme Court considered the statutory language of the act *de novo*, finding that "the clear intent of [the Act] is to ensure that a slayer does not benefit [in any way] from his or her wrongdoing" and that the Act "'shall be construed broadly in order to effect'" that intent.[12] Focusing on this language in the Act, the Court was

that 'neither [David], nor his heirs at law, shall receive directly or indirectly from the Estate of [Shelley].'" *Id.* at 286.

8. *Id.* at 287.

9. *Id.* at 287 n.10 (citing R.I. GEN. LAWS § 33-1.1-2).

10. *Id.* at 287. The justice relied on "§ 33-1.1-15, which prescribes that [the Act] be interpreted 'broadly to effectuate the policy of this State that no person shall be allowed to profit from his or her wrongs.'" *Id.* (citing R.I. GEN. LAWS § 33-1.1-15).

11. *Id.* at 287. The plaintiffs appealed with the additional argument that "Shelley's publicity rights . . . are inheritable," however, as this issue was not raised in the lower court, it was precluded. *Id.* at 288 n.13.

12. *Id.* at 292–93 (quoting R.I. GEN. LAWS § 33-1.1-2; § 33-1.1-15).

not persuaded by the plaintiffs' contention that, as they are not "claiming through" David, they are not barred.[13] The Court held that, even though the Act does not specifically bar a slayer's issue from inheriting, because it is undisputed that the slayer will benefit if his issue is allowed to inherit, the Act bars their inheritance.[14] Jennifer and Jeremy stated that they would use their inheritance to support their father's criminal defense, "if necessary," and the majority considered this admission to be a clear statement that if they inherit they intend to confer a benefit upon David.[15]

Finally, the majority rebutted the dissent's argument that the majority's holding added an 'issue' "category of prohibited beneficiaries" and construed the Act "'limitlessly'" by explaining that their holding is limited to "the facts of this case, in which there is no dispute that the plaintiffs' taking under Shelley's will unquestionably would confer a benefit upon David" but that this will not always be the case when dealing with contingent beneficiaries.[16] Also, the dissent's argument that the benefit was not deriving from the "'death of the decedent'" as required by the statute but is "'one step removed'" was rebutted by the majority's decision that the "explicit language of the Act [] forbids a slayer from benefitting or acquiring property 'in any way as a result of the death of the decedent.'"[17]

COMMENTARY

The Rhode Island Supreme Court gave great weight to the intent of the Act,[18] coming to a conclusion that seemingly embraces such intent. The intent of the Act, to "ensure that a slayer does not benefit from his or her wrongdoing"[19] certainly appears to be met by preventing David, the slayer, from benefitting through his children, who stated on record that they

13. *See id.* at 292–93.
14. *Id.* at 293.
15. *Id.*
16. *Id.* at 293–94 (quoting R.I. GEN. LAWS § 33-1.1-2) (Robinson, J., & Flaherty, J., dissenting).
17. *See id.* (quoting R.I. GEN. LAWS § 33-1.1-2); (Robinson, J., & Flaherty, J., dissenting).
18. *See id.* at 292, 294.
19. *Id.* at 292–93 (citing R.I. GEN. LAWS § 33-1.1-2).

would use their inheritance to pay for his defense. However, in this question of first impression, the Court may not have given the proper consideration to the plain language of the Act.[20] The contention of the dissent, that Jennifer and Jeremy do not fall into either of the two categories of people prohibited from receiving a benefit from the death of the testatrix and that the benefit to David is not deriving from the "'death of the decedent'" as required by the statute but is "one step removed," are important arguments and, although the majority attempted to rebut these arguments in its analysis, there are still factors, addressed below, that are worth consideration.[21]

The Act states that "[n]either the slayer nor any person claiming through him or her shall in any way acquire any property or receive any benefit as the result of the death of the decedent."[22] Under the plain language of this statute, the restrictions contained therein are that the slayer himself, or "those claiming through him"[23] are barred from inheritance if the benefit is "the result of the death of the decedent."[24] The reasoning behind the majority's holding is that the slayer cannot benefit "'in any way'" even if the benefit to the slayer is "one step removed from the 'death of the decedent'" and even if the inheritance is being taken from a party not indicated in the statute and who is specifically named by the decedent.[25] The majority, does not appear to be basing its conclusion on the language of the Act and the plaintiffs' claim to the inheritance as beneficiaries, as much as it is basing its conclusion on the way the plaintiffs intend on using their inheritance, as such use may benefit the slayer.[26]

The majority may be interpreting the statute too broadly by restricting the inheritance of named beneficiaries on the basis of the manner in which they may want to use their inheritance in

20. *See id.* at 285, 292–94.
21. *See id.* at 293–95 (citing R.I. GEN. LAWS § 33-1.1-2).
22. *See* R.I. GEN. LAWS § 33-1.1-2.
23. *See id.*; The majority stated, "it is clear that plaintiffs are not claiming through the slayer. Rather, they seek their share explicitly under the terms of Shelley's will." *Swain,* 57 A.3d at 291.
24. *See* R.I. GEN. LAWS § 33-1.1-2; *Swain,* 57 A.3d at 294–95.
25. *See Swain,* 57 A.3d at 293–94 (citing R.I. GEN. LAWS § 33-1.1-2).
26. *See id.* at 292–94.

the future.[27] The majority's decision, therefore, appears to be opening the door to prohibiting from inheritance anyone who may, at some point in the future, "confer a benefit on the slayer," because a benefit derived by the slayer "'in any way'" would be prohibited.[28] This holding is not only a disincentive to similarly situated beneficiaries from testifying as to their intended use of their inheritance but it is a punishment to named beneficiaries who have done nothing wrong because they volunteered information on their possible intended use.[29] Furthermore, the majority notes that David's murder conviction was overturned and, therefore, there may not even be a benefit conferred to him by the plaintiffs, but instead, the inheritance would serve to benefit the plaintiffs, themselves, as "reimbursement for money already spent for David's benefit."[30] This holding, therefore, is not only a punishment to named beneficiaries for their possible intended use of their inheritance but is a punishment to named beneficiaries for the completely legal way in which they chose to spent their money in the past.[31] Thus, though the majority has based its decision on the intent of the Act by considering the possibility that the slayer may benefit from the plaintiffs' inheritance, it appears to go beyond the true intent of the Act, as expressed in its plain language, by focusing in on one part of the text and interpreting it so broadly as to ignore the restrictive language in the Act.[32]

CONCLUSION

The Rhode Island Supreme Court held that even though the Act does not specifically bar inheritance by a slayer's issue, the Act does bar a slayer from benefitting "'in any way . . . as the

27. *See id.* at 292–95.
28. *See id.* (citing R.I. GEN. LAWS § 33-1.1-2).
29. *See id.* at 294.
30. *See id.* at 293 n.21.
31. *See id.* at 293–94 n.21.
32. The intent of the Act is "ensur[ing] that a slayer does not benefit from his or her wrongdoing." The intent can also be found in the plain language of the Act, restricting those prohibited beneficiaries to "the slayer [and] any person claiming through him or her." The majority, however, only appears to focus on the language that the slayer shall not, "*in any way* . . . receive any benefit as the result of the death of the decedent." *See id.* at 292–94 (citing R.I. GEN. LAWS § 33-1.1-2) *(*emphasis added*).*

result of the death of the decedent.'"[33] The Act, therefore, according to the majority, barred the step children of the decedent from inheriting under the decedent's will because the slayer would benefit from decedent's death if her stepchildren, also the slayer's issues, inherited under her will and used their inheritance to financially support his defense.[34] There is, however, a compelling argument that the Court has gone too far by using the Act to prohibit an inheritance based on the way in which the beneficiary might use that inheritance in the future.

Charlene Pratt

33. *See id.* at 293–94 (citing R.I. GEN. LAWS § 33-1.1-2).
34. *See id.* at 293.

Workers' Compensation. *Ellis v. Verizon New England, Inc.*, 63 A.3d 510 (R.I. 2013). In order for an employee's injury to be compensable under Rhode Island's workers' compensation laws, the injury must occur during the period of employment, at a location where the employee is reasonably expected to be, and while the employee is reasonably fulfilling duties of the employment. Rhode Island adopts an "actual-risk" test to determine if an employee's injury arose out of the course of employment. In essence, the employer must subject the employee to the actual risk that resulted in the employee's injuries. The Rhode Island Supreme Court held that dangers associated with the use of the streets are an actual risk of employment, if the employer requires the employee to use the streets. Additionally, an unprovoked assault can be considered a danger of the streets, dependent upon the area that the assault occurs in.

FACTS AND TRAVEL

On September 17, 2007, Paul Ellis ("Ellis") was sent by his employer, Verizon New England, Inc. ("Verizon"), to repair outdoor cable lines.[1] The lines were located on Union Avenue in the West End of Providence, Rhode Island.[2] When Ellis arrived at the job site, he witnessed a man shouting statements such as, "The country is going down. The President is dead."[3] Ellis initially ignored the man and continued to repair the cable lines; however, he eventually approached the stranger.[4] The stranger did not verbally respond, but instead struck Ellis several times in the head with a piece of wood.[5] The stranger fled the scene, but was later apprehended by authorities and criminally indicted.[6]

Ellis filed suit against Verizon in Workers' Compensation Court.[7] The trial court stated that in order for an employee's injury to be compensable under Rhode Island's workers'

1. Ellis v. Verizon New England, Inc., 63 A.3d 510, 512 (R.I. 2013).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* The injury resulted in two different wounds to Ellis' head and required fourteen staples to close his lacerations. *Id.* Ellis did not return to work for approximately two months after the assault. *Id.*
6. *Id.*
7. *Id.*

compensation laws, a nexus is required between the injury and the conditions of the employment.[8] Specifically, the employer must subject the employee to the actual risk that caused the injuries sustained.[9] Ellis offered testimony from James Lucht, the Information Group Director of Providence Plan, an organization that "compiles and aggregates statistics on violent crimes in various Providence neighborhoods."[10] Lucht testified that the West End was a hot spot for violent crime based on data from 2002 to 2007.[11] The majority of the data was publicly available; however, the statistical breakdown of specific crimes was not publicly available.[12] Therefore, the trial court held that the publicly unavailable statistics were inadmissible because Verizon could not be held accountable for information that it could not be aware of.[13] Further, Ellis' supervisor testified at trial that he was unaware of any assaults that occurred in the West End area on Verizon employees.[14] Ellis' workers' compensation benefits were denied because he failed to differentiate between the types of crimes associated with the West End and was unable to establish Verizon's knowledge of the statistical data for the area.[15] Therefore, the trial judge held that Verizon did not subject Ellis to the actual risk that caused his injuries.[16]

Ellis appealed and the Appellate Division affirmed the trial court's ruling, holding that "the trial judge did not err in determining that the evidence adduced at trial failed to establish

8. *Id.* at 513. See R.I. GEN. LAWS § 28-33-1 (2003) (" . . . receives a personal injury arising out of employment, connected and referable to the employment . . . ").

9. *Ellis*, 63 A.3d at 513.

10. *Id.* at 512.

11. *Id.* Lucht testified that "'[v]iolent crimes' included murder, sexual assault, robbery, and aggravated assault." *Id.*

12. *Id.* at 512–13.

13. *Id.* at 513.

14. *Id.* at 512. Ellis' supervisor was tenured with the company and had worked with Verizon for thirty-nine years. *Id.* Despite the lack of knowledge of prior assaults in the area, Verizon sent employees to the neighborhood in pairs while the assailant was at large and continued to reassign employees that were unwilling to work in the area for weeks afterwards. *Id.*

15. *Id.* at 513. Under Rhode Island workers' compensation law, the plaintiff has the burden of establishing the connection between the injury and the conditions of the employment. R.I. GEN. LAWS § 28-33-1 (2003). *See also* Toolin v. Aquidneck Island Med. Res., 668 A.2d 639, 640 (R.I. 1995).

16. *Ellis*, 510 A.3d at 513.

that this random assault was an actual risk of Ellis's employment."[17] A writ of certiorari was granted by the Rhode Island Supreme Court.[18] The Court reviewed only one of the four issues considered on appeal: if street perils,[19] in particular an unprovoked assault,[20] of the West End were an actual risk of Ellis' employment.[21]

ANALYSIS AND HOLDING

The issue of whether there is a nexus between a plaintiff's injury and the conditions of the plaintiff's employment in a workers' compensation claim is "a mixed question of law and fact."[22] The Court shall accept the findings of fact from the trial court; however, if the facts are undisputed, the issue is purely a question of law and the Court may substitute the judgment.[23]

The Court adopted a three-prong test to determine if a nexus existed between the injuries sustained and the employee's conditions of employment:

> We first inquire whether the injury occurred within the period of the employee's employment. Next, we examine the situs of the injury to determine whether it occurred at a place where the employee might reasonably have been expected to be. Third, we inquire whether the employee was reasonably fulfilling the duties of his or her job at the time of the injury or was performing some task incidental to those conditions under which those duties were to be performed.[24]

The Court only found the third prong to be at issue[25] and adopted

17. *Id.*
18. *Id.*
19. A street peril is a danger that is associated with the use of the streets. *See generally id.* at 516.
20. An unprovoked assault is different from an assault specifically directed at an individual for personal reasons. *Id.* at 515 n.2. *See, e.g.*, Gaudette v. Glass-Kraft, Inc. 163 A.2d 23 (R.I. 1960).
21. *Ellis*, 63 A.3d at 514.
22. *Id.* at 513–14.
23. *Id.* at 514.
24. *Id.* at 514–15.
25. Prongs one and two were not at issue because it was undisputed that the assault occurred during Ellis' work hours and at a location where Verizon required him to be. *Id.* at 515.

the actual-risk test to determine if the injury arose out of the course of employment.[26] Under the actual-risk test, an injury that arises from an actual risk of the particular employment is compensable, even if the risk is one that is general to the community.[27] Specifically, the Court considered if street perils were compensable under the actual-risk test, and if so, if an unprovoked assault is considered a street peril.[28]

Reluctant to broaden the scope of the actual-risk test too far and risk a flood of workers' compensation claims, the Court turned to the overarching policy of the governing laws.[29] On one side of the scale, the Court recognized that workers' compensation redress is available to ensure that employees have a means to provide for medical and financial ends if they are injured during employment.[30] The Court reasoned that an employer is better situated to carry the burden that may result from the risks of his employment than the employee.[31] However, despite the humanitarian underpinning of workers' compensation litigation, the Court additionally acknowledged that the Legislature did not intend to open the floodgates and compensate every employee injured during the course of their employment.[32]

Policy considerations aside, the Court reviewed applicable precedent and persuasive authority in order to determine if streets perils can be an actual risk of employment and if an unprovoked assault can be considered a street peril.[33] In

26. *Id.* The Court mentions two other known approaches for determining if prong-three is met: "increased-risk" test ("[I]njury is compensable if the employment increased the amount of exposure to a general risk that is not unique to that employment but, rather, is one to which the general public is exposed") and "positional-risk" test (" . . . essentially applies a 'but-for' analysis . . . "). *Id.* *See generally* 1 ARTHUR LARSON & LEX K. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 3.03 at 3–5; § 3.04 at 3–5, § 3.05 at 3–6 (Matthew Bender, rev. ed. 2012).

27. *Ellis*, 63 A.3d at 515.

28. *Id.* at 515–16.

29. *Id.* at 517.

30. *Id.*

31. *Id.* *See also infra* text accompanying notes 53–55.

32. *Ellis*, 63 A.3d at 517. *See, e.g.*, Zuchowski v. U.S. Rubber Co., 229 A.2d 61, 65–66 (R.I. 1967) (stating that allowing compensation for all injuries that occur during the course of employment would be to treat employers as insurance companies).

33. *Ellis*, 63 A.3d at 516, 518.

preceding case law,[34] Rhode Island recognized that the risks of using the public streets, such as car accidents, can be actual risks of employment if the employer requires the employee to use the streets.[35] Therefore, the Court recognized that Ellis' injuries would have been compensable had he been struck by an automobile while crossing the street because Verizon required Ellis to use the streets.[36] However instead of Ellis' injuries resulting from an automobile accident, the injuries were caused from a stranger that was "at least slightly off his rocker."[37] Nevertheless, the Court found "no meaningful difference" between the two risks and reasoned that "in either instance, the possibility of injury is an actual risk to which employees are necessarily exposed if they are required by their employees to travel on public roads."[38] Additionally, the Court looked to the New York Court of Appeals[39] to reinforce its expansion of street perils.[40] With reliance on *Katz v. Kadans & Company*, the Court recognized that urban streets are filled with "street brawlers, highwaymen, escaping criminals, [and] violent madmen" and with using the streets comes the risk of engagement with such "dangerous characters."[41] Even so, the Court cautioned that street perils

34. *See, e.g.*, *Toolin*, 668 A.2d at 641 (holding that an automobile accident that occurred while the plaintiff was traveling from appointment to appointment for her employer was an actual risk of the employment); Branco v. Leviton Mnfg. Co., 518 A.2d 621, 623 (R.I. 1986) (holding that being struck by an automobile while crossing an intersection from an employee parking lot was an actual risk of employment); Sullivan v. State, 151 A.2d 360, 361–62 (R.I. 1959) (holding that being struck by an automobile while using the highway to retrieve refreshments for an employer was an actual risk of employment). *But see* Nowicki v. Bryne, 54 A.2d 7, 8–9 (R.I. 1947) (failing to hold that a stray bullet crossing the street, encountered while departing from work, was an actual risk of employment).

35. *Ellis*, 63 A.3d at 516.

36. *Id.* at 517. In order for Ellis to repair the outdoor cable lines he had to park his work vehicle on the street and walk to and from that location. *Id.*

37. *Id.*

38. *Id.*

39. *See* Katz v. A. Kadans & Co., 134 N.E. 330, 331 (N.Y. 1922) (holding that stabbing injuries sustained by a chauffeur during employment hours were compensable because the risk of being stabbed by an insane man was incidental to the conditions of his employment).

40. *Ellis*, 63 A.3d at 518.

41. *Id.* (quoting *Katz*, 134 N.E. at 331). With reliance on *Katz*, the Court accepted that the streets encompass a variety of actual risks outside of automobile accidents. *Id.*

should be analyzed on a case-by-case basis and should only satisfy the actual-risk test if the employer requires the employee to use the streets which encompass such perils.[42]

The Court concisely summarized its holding and stated: "the risks of the street are the risks of employment, if the employment requires the employee's use of the street."[43] Therefore, street perils were an actual risk of Ellis' employment because Verizon required Ellis to work on the streets on a regular basis.[44] Moreover, the Court expanded the definition of street peril and held that a "random assault by a stranger" in an urban area was a street peril under the circumstances.[45] Thus, Ellis' injuries were compensable under Rhode Island workers' compensation laws because they resulted from an actual risk that Verizon subjected him to, namely the street peril of an unprovoked assault.[46]

COMMENTARY

The Rhode Island Supreme Court correctly and appropriately expanded the scope of the actual-risk test. The Court considered public policy, legislative intent, Rhode Island precedent and precedent of neighboring states to ensure that the floodgates to workers' compensation would not explode.[47] The Court emphasized a case-by-case approach when considering various street perils as actual risks and emphasized that the employer must subject the employee to such risks in order for the injury to be compensable.[48]

Unfortunately there are a wide range of street perils associated with urban city streets that extend beyond automobile accidents.[49] Many of these risks can pose greater danger than the danger associated with other employment tasks.[50] If an employer

42. *Id.*

43. *Id.* (quoting Hudson v. Thurston Motor Lines, Inc., 583 S.W.2d 597, 602 (Tenn. 1979)).

44. *Ellis*, 63 A.3d at 518.

45. *Id.*

46. *Id.*

47. *See supra* notes 30–32, 34–35, 39–41 and accompanying text.

48. *Ellis*, 63 A.3d at 518.

49. *See, e.g.*, *Katz*, 134 N.E. at 331 (stating examples of different types of street perils associated with urban areas to include: fragmented pavements, hostile crowds, ferocious animals, fleeing criminals, police chase and gunfire).

50. For example, the injuries associated with a slip and fall that

chooses to subject an employee to these (often escalated) risks of the streets, the employer should bear the burden of compensation if the risk manifests itself into actual harm.[51] The employer is often in a better position to bear the burden of compensation because the State of Rhode Island requires all employers[52] to obtain workers' compensation insurance.[53] Although employers should not be used as insurance agencies in workers' compensation litigation, Rhode Island workers' compensation laws require employers to act as an intermediary to insurance companies.[54] Between two "innocent" parties, the insured employer is better equipped to bear any loss than a potentially insolvent plaintiff.[55] Nonetheless, regardless of the insurance requirement imposed on Rhode Island employers, it is still essential to maintain control over the compensability of injuries that occur in the employment context to avoid overcompensation and the possibility of illegitimate claims.[56]

Safeguards are in place to ensure that workers' compensation benefits are not abused.[57] A plaintiff has the burden to prove that

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occurred while a janitor is mopping a high school hallway will most likely be less severe than the injuries associated with a mugging that takes place as the janitor disposes of the trash in a dumpster across the street in an urban neighborhood.

51. *See Ellis*, 63 A.3d at 518. It should also be noted that injuries from some forms of street perils may have little chance for recovery in the traditional tort system. For instance, in Ellis, it was unlikely that the plaintiff could have filed an intentional tort against his assailant and recovered from a crazed stranger on the streets. *Generally see id.* Therefore, it is more appropriate for a risk-subjecting employer to bear the burden than an innocent plaintiff. *Id.* at 517.

52. Employer is defined as "[e]very person, firm, and private corporation, including any public service corporation, including the state, that regularly employs employees in the same business or in or about the same establishment under any contract of hire, express or implied, and a city or town in this state that votes to accept the provision of those chapters in the manner provided . . . " R.I. GEN. LAWS § 28-29-6 (2003).

53. *See* R.I. GEN. LAWS § 28-36-1 (2003).

54. *See id. See also supra* note 32.

55. *See* R.I. GEN. LAWS § 28-36-1 (2003).

56. Rhode Island also regulates the forms of workers' compensation benefits. *See, e.g.*, Bissonnette v. Fed. Dairy Co., Inc., 472 A.2d 1223, 1226 (R.I. 1984) (holding that "pain is not compensable under [Rhode Island's] compensation statute"); Provencher v. Glass-Kraft, Inc., 264 A.2d 916, 919 (R.I. 1970).

57. For example, using a case-by-case approach instead of adopting a broader scope of risk approach. *See Ellis*, 63 A.3d at 518.

his injuries are compensable under the three-prong test[58] and specifically, that his employer subjected him to an actual risk that resulted in harm.[59] The Rhode Island Supreme Court adhered to the general rules governing workers' compensation benefits and acknowledged that the employment context often encompasses risks that may not be generally thought of but, that employees are still forced to face.[60]

CONCLUSION

The Rhode Island Supreme Court adopted the actual-risk test to determine if an employee's injury arose out of the context of the employment.[61] The Court held that street perils, in particular a random assault by a stranger, are an actual risk of employment if the employer requires the employee to use the streets.[62] Additionally, the sufficiency of a particular street peril under the actual-risk test and whether the employer actually subjected the employee to such risk should be considered on a case-by-case basis to retain structure and to balance policy considerations.[63] Therefore, if an employer requires an employee to use the streets and a street peril associated with that area results in an actual injury, the injury is compensable under Rhode Island's workers' compensation laws.[64]

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58. *See supra* text accompanying note 26.
59. *Ellis*, 63 A.3d at 515.
60. *See id.* at 517–18.
61. *Id.* at 515.
62. *Id.* at 518.
63. *Id.* at 517–18.
64. *Ellis*, 63 A.3d at 518. The injury would be compensable so long as the first two prongs of the adopted test were satisfied. *See supra* note 26.

2013 R.I. Pub. Laws ch. 004, 005. An Act Relating to Domestic Relations – Persons Eligible to Marry. As amended, this law redefines persons eligible to marry in Rhode Island. The "Equal access to marriage" section, § 15-1-1, provides that "any person who otherwise meets the eligibility requirements of chapters 15-1 and 15-2 may marry any other eligible person regardless of gender;" thus, allowing same-sex marriage. Meanwhile, § 15-1-2 was renamed to forbid kindred marriages, and §15-1-3 remains to void any incestuous marriages. Under §15-1-5, bigamous marriages are void, as are marriages where either of the parties were mentally incompetent at the time of the marriage.

The Act added §§15-1-7 to 15-1-9 to address marriage codification, the recognition of relationships entered into in another state or jurisdiction, and the applicability of state laws to marriages not recognized by federal law, respectively. Section 15-1-7 reiterates that "marriage is the legally recognized union of two (2) people," and that interpretation of the martial or familial relationship must be construed consistently with this definition throughout all areas of the law. Next, section 15-1-8 provides that if two persons are within Rhode Island's jurisdiction and "have a legal union other than a marriage that provides substantially the same rights, benefits, and responsibilities as a marriage," and is not expressly prohibited by Rhode Island law, then that marriage is recognized under Rhode Island law. Also, section 15-1-9 extends any provisions and benefits of Rhode Island law to anyone recognized as a spouse under Rhode Island law, regardless of federal recognition of that individual as a spouse.

Section 15-3-6.1 was added to protect freedom of religion in marriage and provides that religious institutions have "exclusive control over its own religious doctrine, policy and teachings regarding who may marry within its faith, and on what terms," consistent with §15-1-2 (forbidding kindred marriages), §15-1-3 (incestuous marriages void), §15-1-4 (marriages of kindred allowed by the Jewish religion), and §15-1-5 (bigamous marriages void). Further, no official of any church or religious denomination is

required to officiate or solemnize any marriage and is immune from any civil suit for refusing to do so. The state and local government may not "base a decision to penalize, withhold benefits from, or refuse to contract with" any such church or religious denominations for refusing to solemnize a marriage.

Section 15-3.1-12 was added to merge civil unions into marriages by action of the parties of a civil union, provided that these parties are otherwise eligible to marry under the amended Rhode Island law, and the parties to the marriage will be the same as the parties to the civil union. Upon solemnization of the marriage and filing for a marriage license pursuant to §15-2-1, the civil union is merged into a marriage effective as of the date of the recording of the marriage certificate. Alternatively, parties to a civil union may apply to the clerk of the town or city in which their civil union was recorded and, at no additional expense or requirements, have the union legally designated and recorded as a marriage. Section 15-3.1-13 provides that the date the marriage certificate is recorded is the recognized date of marriage between the parties.

The sections entitled "Civil Unions" were repealed entirely.

2013 R.I. Pub. Laws ch. 029, 044. An Act Relating to Courts and Civil Procedure – General Powers of Supreme and Superior Courts. This Act requires the approval of the Rhode Island Supreme Court regarding any rules that regulate the practice, procedure, and business of the state's Workers' Compensation Court. This change is consistent with the procedures that are currently in effect for the Superior, Family, and District Courts, as well as the Traffic Tribunal in Rhode Island. Further, the Workers' Compensation Court is now included within the judicial bodies that are empowered to "make the rules for regulating practice, procedure and business therein."

2013 R.I. Pub. Laws ch. 148, 197. An Act Relating to Criminal Offenses – Children. The Rhode Island General Assembly amended the law to allow the tattooing of minors under the age of eighteen (18) for medical purposes. In order for this exception to apply, the minor must be accompanied by a parent or legal guardian. Both parties must provide the tattoo artist with valid government-issued, photo identification and must submit

written proof that he/she is the minor's parent or guardian, and a physician's written notarization of consent for the tattoo. The tattoo artist must be properly licensed in the state of Rhode Island and is charged with proper maintenance of their clients' records. If the tattoo artist makes a good faith effort to validate the identities of the minor and parent or guardian but is deceived, the artist shall not be charged with violation of this law. Upon first conviction of violation of this law, the maximum penalty shall be a fine not to exceed three hundred dollars ($300); but upon subsequent violations resulting in conviction, the violation will be classified as a misdemeanor and accompanied by a fine of up to five hundred dollars ($500). It is within the power of the Department of Health to create regulations relating to compliance with this law as well as create applications and certificates necessary to implementing this law.

2013 R.I. Pub. Laws ch. 158, 233. An Act Relating to Behavioral Healthcare, Developmental Disabilities and Hospitals. Should a parent not be able to care for a person with developmental disabilities, this act allows an interested and approved relative (such as an adult sibling) to serve as a shared living provider subject to already-existing rules and receive the financial aid or subsidies. The Director of Mental Health, Retardation, and Hospitals continues to be authorized to set regulations relating to care by approved parents and now also by approved relatives of persons with developmental disabilities. This act also directs the Department of Behavioral Healthcare, Developmental Disabilities and Hospitals to "develop options, fiscal impact analysis, and recommendations for the expansion of shared living services to siblings of individuals with developmental disabilities who are no longer able to be cared for at home by aging parents."

2013 R.I. Pub. Laws ch. 165, 222. An Act Relating To Health and Safety – Licensing of Massage Therapy Establishments. This act creates various substantive and procedural changes in licensing and regulating the massage therapy profession, including the establishment of a seven-member board appointed by the director of health and approved by the governor. In part, this act serves to protect the profession

through prohibiting unlicensed persons from holding themselves out as massage therapists under any of nine terms or their derivatives, codifying licensing standards, and suggesting further possible regulations for the board's consideration.

2013 R.I. Pub. Laws ch. 185, 235. An Act Relating To Towns And Cities – Subdivision Of Land. This act modernizes public hearing and notice requirements with an additional requirement that municipalities establish and maintain an electronic public notice registry, allowing any person or entity to register for electronic notice of any changes to local regulations. Municipalities are also encouraged to provide notice to interested parties and to the general public of the new registry.

2013 R.I. Pub. Laws ch. 190, 200. An Act Relating to Domestic Relations – Divorce and Separation. As amended, this act denies an individual custody of, or visitation with, a child if that individual has been convicted of, or pled nolo contender, to a violation of §11-37-2 (first degree sexual assault), §11-37-4 (second degree sexual assault), or §11-37-8.1 (first degree child molestation sexual assault), or a comparable law of another jurisdiction, and the child in question was conceived as a result of that violation. However, the court may order supervised visitation and counseling if, after a hearing by the family court, it finds that the natural mother or legal guardian consents to visitation with the child, and the court determines visitation is in the best interest of the child.

2013 R.I. Pub. Laws ch. 192, 240. An Act Relating to Bryant University. Amended to state that the town of Smithfield shall, from March 1, 2014 onward, charge any private, non-profit college or university located and operating within its town for the costs of its usage of police, fire, and rescue services, unless specifically reimbursed otherwise. However, colleges and universities in Smithfield are free to enter into a memorandum of agreement with the town to stipulate alternative billing agreements.

2013 R.I. Pub. Laws ch. 193, 371. An Act Relating to Alcoholic Beverages – Regulation of Sales. As amended, this law allows retail Class A liquor license holders to open beginning at

10:00 a.m. on Sundays instead of noon, as was previously authorized. The law still requires license holders to close no later than 6:00 p.m. on Sundays, unless the following Monday is a holiday, in which event it is permissible to stay open no later than 9:00 p.m.

2013 R.I. Pub. Laws ch. 255, 432. An Act Relating to Courts and Civil Procedure – Particular Actions – Small Claims and Consumer Claims. As amended, this law increases the jurisdictional limit on counterclaims properly filed in small claims court from one thousand five hundred dollars ($1,500) to two thousand five hundred dollars ($2,500).

2013 R.I. Pub. Laws ch. 271, 361. An Act Relating To Public Utilities And Carriers – Property Assessed Clean Energy - Residential Program. This law establishes a new financing program, "Property-Assessed Clean Energy" (PACE), which lowers the financial barriers to homeowners associated with energy upgrades. PACE financing allows loans of up to twenty years in duration at low fixed rates. Liens established through PACE are subordinate to previously existing liens but superior to liens created after the PACE filing; however, participating financial institutions are also protected through a Loan Loss Reserve Fund (LLRF). The Office of Energy Resources contracts with approved financial institutions to manage a LLRF with a minimum deposit of one million dollars, backed by American Recovery and Reinvestment Act, Department of Energy State Energy Program funds. Municipalities need not raise bonds and are not liable for the performance of the program. Municipalities may also receive assistance from Rhode Island's Office of Energy Resources in implementing and publicizing the PACE program. The law requires the Office of Energy Resources to, beginning on or before July 1, 2014, publish on its website a list of the types of eligible energy efficiency and renewable projects that are available, respond to municipal requests for information, offer administrative and technical assistance to participating municipalities, and develop and offer informational resources to help residents make best use of the PACE program.

2013 R.I. Pub. Laws ch. 291, 393. An Act Relating to Motor

and Other Vehicles – Miscellaneous Rules. This Act increases the penalties for sending text messages while operating a motor vehicle. A conviction for a first violation of this law can now result in an eighty-five dollar ($85) fine, up to a thirty (30) day license suspension, or a combination of both. For a subsequent violation, conviction can result in a one hundred dollar ($100) fine, up to a three (3) month license suspension, or both. A third violation and any thereafter, can now result in a one hundred twenty-five dollar ($125) fine, up to a six (6) month license suspension, or both.

2013 R.I. Pub. Laws ch. 293, 402. An Act Relating to Courts and Civil Procedure – General Powers of Supreme and Superior Courts. This section was amended to increase the "reasonable" arbitration cost that the court could charge to litigants from three hundred dollars ($300) to five hundred dollars ($500). Also, if a party wishes to reject an arbitration award and proceed to trial, the court may now order a three hundred dollar ($300) filing fee in conjunction with the demand, as opposed to the previous two hundred dollar ($200) fee. The amendment mandates that if both parties reject the arbiter's award, then the first filing fee received will designate the party rejecting the award, whereas it was previously apportioned amongst the parties.

2013 R.I. Pub. Laws ch. 327, 392. An Act Relating to Criminal Offenses – Flags and Emblems. This section was amended to add the attorney general, deputy attorney general, assistant or special assistant attorney general to the list of public officers, impersonation of which results in a violation of this law and up to one (1) year imprisonment or a one thousand dollar ($1,000) fine upon conviction. This act stipulates that an unauthorized person, firm, or corporation cannot use the department of the attorney general's emblem in order to perpetrate fraud, deceit, or harm. Conviction of using the emblem in such a manner is a misdemeanor and subjects the individual to a one (1) year term of imprisonment, a fine of up to five hundred dollars ($500), or both.

2013 R.I. Pub. Laws ch. 338, 424. An Act Relating To Labor And Labor Relations – Minimum Wage. This amendment raises the minimum wage to $8 per hour beginning on January 1, 2014

for approximately 23,000 Rhode Island workers and requires annual adjustments by the Department of Labor and Training commencing January 1, 2015. The amendment also requires the Rhode Island minimum wage rate to automatically increase to fifteen cents ($.15) above the rate set in the Fair Labor Standards Act, "if the federal minimum wage equals or becomes higher than the state minimum."

2013 R.I. Pub. Laws ch. 334, 415. An Act Relating to Delinquent and Dependent Children – Proceedings in Family Court. As amended, this law requires a probation counselor to file a petition in family court alleging a violation of probation if, at any time during a child's probationary period, he is charged with an additional and subsequent offense, that if committed by an adult would constitute a felony. A probation counselor has discretion to file a petition in the family court alleging the same if, during the child's probationary term, he is charged with an additional and subsequent "wayward/disobedient or status offense." Prior to the amendment, a probation counselor only had an obligation, at the end of the child's probationary period, to report to the court regarding the child's conduct during the probationary period.

2013 R.I. Pub. Laws ch. 336, 429. An Act Relating to Criminal Offenses – Children. As amended, this law includes a new section requiring, among other things, signs provided by the department of behavioral healthcare, developmental disabilities, and hospitals to include the following language, in both English and Spanish:

"WARNING: SMOKING CIGARETTES CONTRIBUTES TO LUNG DISEASE, CANCER, HEART DISEASE, STROKE AND RESPIRATORY ILLNESS AND DURING PREGNANCY MAY RESULT IN LOW BIRTH WEIGHT AND PREMATURE BIRTH."

The signs must be white with red lettering, at least one-quarter of an inch high, and must also include information pertaining to resources available in Rhode Island for those who wish to quit using tobacco products. These signs, along with any and all signs concerning the sale of tobacco products to individuals under the age of 18, must be displayed prominently wherever tobacco products are sold and must also be available electronically

in both English and Spanish on the department of behavioral healthcare, developmental disabilities, and hospitals' websites.

2013 R.I. Pub. Laws ch. 454, 481. An Act Relating to Criminal Offenses. This law was amended to include regulations for firearms where there is no maker's name, model, manufacturer's number or other identifying marks on the firearm. Should a firearm be missing such identification, without obtaining recertification paperwork, a person shall not knowingly possess, transport, or receive any such firearm. Possession of a firearm, without recertification paperwork, without its identifying marks or with such marks that have been altered, removed, or obliterated constitutes prima facie evidence that the individual in possession of the firearm altered, removed, or obliterated the identifying mark(s). Recertification paperwork may be obtained by the person in possession of such a firearm, with proof of ownership and/or transfer from a Federal Firearms License (FFL) dealer, from a Rhode Island based licensed firearms business owner who is also an FFL dealer or from a local police chief or department official, if there has only been partial damage to the firearm's identifying mark(s). Within sixty (60) days, the firearms business owner, local police chief, or police department official shall recertify the firearm to the person who presented it and certify the identification information in a notarized document, or if there are no identification markers on the firearm, then any other mark that has been only partially damages and thus is still identifiable and traceable to the record owner so long as the certifying party is reasonably able to verify the ownership of the firearm and its identifying marks. If a recertified firearm is sold or transferred or a report by the record owner is submitted that the firearm was stolen, the recertification documentation is immediately voided. Violation of this law may result in a term of imprisonment for up to five (5) years, and does not apply to the lawful exchange of component parts of firearms nor to antique and collectible weapons lawfully in firearm collectors' and dealers' possession.

2013 R.I. Pub. Laws ch. 455, 464. An Act Relating to Criminal Offenses – Firearm Violations. This law created Section 11-47-5.2, "Possession of a stolen firearm," thereafter making it a

felony to possess a firearm that one knows to be stolen and providing the appropriate sentencing guidelines. Under the new law, any person found in violation is to be sentenced to no less than three (3) and not more than fifteen (15) years of imprisonment, which is an increase from the previous maximum of ten (10) years.

2013 R.I. Pub. Laws ch. 462, 463. An Act Relating to Alcoholic Beverages – Manufacturing and Wholesale Licenses. This Act, as amended, provides that an alcohol manufacturer licensee may provide "clearly marked" samples to guests as part of a "tour and/or tasting" for off-premise consumption. However, the Act requires that the sample beverage be manufactured at the licensed plant and also places a limit of three hundred seventy-five milliliters (375 ml) per visitor for distilled spirits and seventy-two ounces (72 oz) per visitor for malt beverages.